89-265

Supreme Court, U.S.
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No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

EASTON PUBLISHING COMPANY

Petitioner,

v.

ALFRED R. BOETTGER

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

*PAUL L. O'BRIEN
ARTHUR D. MCKEY
Hanson, O'Brien, Birney & Butler
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 298-6161

THOMAS P. STITT, SR.
APRIL L. CORDTS
Stitt & Cordts
Meridian Bank Building
Suite 408
Easton, Pennsylvania 18044
(215) 253-9111

Attorneys for Petitioner

*Counsel of Record

QUESTIONS PRESENTED

I. WHETHER A STATE STATUTE WHICH CREATES A CIVIL CAUSE OF ACTION FOR PUBLICATION OF TRUTHFUL INFORMATION OBTAINED FROM PUBLIC COURT FILES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

II. WHETHER A STATE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY IMPOSING STRICT LIABILITY IN THE FORM OF AN IRREBUTABLE PRESUMPTION OF INVASION OF PRIVACY.

STATEMENT PURSUANT TO SUPREME COURT RULES 21.1(b) and 28.1

Pursuant to Supreme Court Rules 21.1(b) and 28.1, the following parties appeared below: Alfred R. Boettger, plaintiff; Thom Loverro, defendant; and Easton Publishing Company, defendant. Thom Loverro was dismissed as a defendant prior to trial and is not a party to this petition. Defendant Easton Publishing Company, at the time of trial, was a closely held Pennsylvania corporation.

Subsequent to trial, Easton Publishing Company was dissolved pursuant to court order. The judgment in this case is enforceable against the former shareholders of the company. Funds to satisfy the judgment are being held in escrow by counsel to the parties. In the event this Court reverses the decision below, said funds will be distributed to the former shareholders under the court approved plan of dissolution. During its existence, Easton Publishing Company had no

subsidiaries or parent companies. The former shareholders of Easton Publishing Company are the following:

Thomas P. Stitt, Trustee under agreement dated 2/7/67 for benefit of Jean Thompson; William C. Stackhouse; Donald W. Diehl; Helen C. Bradford; Marjorie M. Stackhouse; Linda Rand, Trust Officer, Lafayette Bank for Estate of George F. Coffin, Jr.; First Valley Bank and Judith F. Thomas, Co-Trustees under deed of trust of Adele S. Fretz dated December 23, 1969; Catharine McGrath; Clare Hoke; Donald S. Stackhouse; J. L. Stackhouse, Jr.; Joan E. Warker; Patricia Koch; John H. McGrath, III; Marjorie H. Diehl; Henrietta A. McPherson; Carole L. Baker; James C. Hoke; James L. Baker, Jr.; BMS & Company, Nominee c/o Central Trust Bank Trust Department; Blanche A. Snyder Trust c/o Central Trust Bank Trust Department; Blanche A. Snyder; Henry S. Fretz; Judith F. Thomas; Gary R. Morgan and Carter R. Buller, Esquires, Executors of the Estate of John L. Fretz; Richard L. Ament, III; Austin Ament Taber; Peter S. Ament.

Rule 28.4(c) STATEMENT

In this proceeding, the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978, 18 Pa. Cons. Stat. § 5725, is drawn into question. The Commonwealth of Pennsylvania is not a party to this proceeding. Because 28 U.S.C. § 2403(b) may be applicable, this Petition for Certiorari is being served upon Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, PA 17120.

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OPINIONS BELOW

The following are reproduced in their entirety in the Appendix:

Appendix A — Order of the Supreme Court of Pennsylvania dated May 18, 1989, denying the Petition for Reargument (and denying the Application for Relief filed by the Pennsylvania Attorney General).

Appendix B — Judgment and Opinion of the Supreme Court of Pennsylvania dated March 8, 1989, in *Boettger* v. *Loverro, et al.*, 555 A.2d 1234 (Pa. 1989).

Appendix C — Opinion of the Superior Court of Pennsylvania dated January 3, 1986, in *Boettger* v. *Loverro, et al.*, 502 A.2d 1310 (Pa. Super. Ct. 1986).

Appendix D — Order of the Court of Common Pleas of Northhampton County, Pennsylvania en banc dated March 6, 1984.

JURISDICTIONAL STATEMENT

This case was tried before the Court of Common Pleas of Northhampton County, Pennsylvania. The trial court directed a verdict in favor of the respondent on the ground that the petitioner was strictly liable for the publication of truthful information contained in public court files pursuant to Section 5725 of the Wiretapping and Electronic Surveillance Control Act of 1978, 18 Pa. Cons. Stat. § 5701 et. seq. The trial court entered judgment on March 6, 1984. (Appendix D)

In an opinion dated January 3, 1986, the Superior Court of Northhampton County reversed the trial court and entered judgment in favor of petitioner. (Appendix C)

In an opinion dated March 8, 1989, the Supreme Court of Pennsylvania reinstated the trial court's judgment against petitioner. (Appendix B)

Petitioner filed a timely Petition for Reargument which was denied by the Supreme Court of Pennsylvania on May 18, 1989. (Appendix A)[1]

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a) as a case which draws into question the validity of Pennsylvania statute 18 Pa. Cons. Stat. § 5725 on the grounds that it is repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. 1: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . . "

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[1]Following the March 8, 1989 decision of the Supreme Court of Pennsylvania in this case, the Pennsylvania Attorney General filed an "Application for Relief" which was also denied in the same Order (Appendix A) dated May 18, 1989.

U.S. CONST. AMEND. XIV, § 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

18 PA. CONS. STAT. § 5703: INTERCEPTION, DISCLOSURE OR USE OF WIRE OR ORAL COMMUNICATIONS

> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:
>
> (2) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication or evidence derived therefrom, knowing, or having reason to know that the information was obtained through the interception of a wire or oral communication; . . .

18 PA. CONS. STAT. § 5714: RECORDING OF INTERCEPTED COMMUNICATIONS

(b) Sealing of recordings.—Immediately upon the expiration of the order or extensions or renewals thereof, all monitor's records, tapes and other recordings shall be transferred to the judge issuing the order and sealed under this direction. Custody of the tapes, or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of the court and in any event shall be kept for ten years. Duplicate tapes, or other recordings may be made for disclosure or use pursuant to section 5717 (relating to disclosure or use of contents of wire or oral communications or derivative evidence). The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under section 5717(b).

18 PA. CONS. STAT. § 1515: SEALING OF APPLICATIONS, ORDERS, AND SUPPORTING MATERIAL

Applications made, final reports, and orders granted pursuant to this chapter and supporting papers and monitor's records shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for ten years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction except that any investigative or law enforcement officer may disclose such applications, orders and supporting papers to investigative or law enforcement officers of this or another state, any of its political subdivisions, or of the United States to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. In addition to any remedies and penalties provided by this chapter, any violation of the provisions of this section may be punished as contempt of the court.

18 PA. CONS. STAT. § 5725: CIVIL ACTION FOR UNLAWFUL INTERCEPTION, DISCLOSURE OR USE OF WIRE, ELECTRONIC OR ORAL COMMUNICATION

(a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation; or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.—To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.—It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

STATEMENT OF THE CASE

This case arises from the publication of an article in the April 7, 1982 edition of *The Easton Express*, a daily newspaper of general circulation which was owned and published by Easton Publishing Company. The article, which was written by reporter Thom Loverro, discussed the contents of wiretapped conversations recorded by the Pennsylvania State Police pursuant to an investigation of the respondent, Alfred R. Boettger. On November 17, 1981, the Pennsylvania State Police secured a wiretap permit from the Office of the Pennsylvania Attorney General. Under the permit, a private citizen named Wayne Dickenson consented to a phone tap. On November 19, 1981, the Pennsylvania State Police intercepted a telephone conversation between Boettger and Wayne Dickenson. In the conversation, Boettger revealed his involvement in the acceptance of illegal bets on college football games. The Pennsylvania State Police raided Boettger's home on December 12, 1981. Following the search, Boettger was arrested on charges of bookmaking, pool selling and conspiracy. As a result of a preliminary hearing, Boettger was bound over for criminal court. A motion for discovery was filed on behalf of Boettger on February 9, 1982. The motion included a request for the production of a transcript of the wiretapped conversation. The Northampton County District Attorney in responding to the discovery request attached a copy of the wiretap transcript to his response to discovery which was filed with the Clerk of the Office of Criminal Court.

The Northampton County District Attorney did not direct the clerk to impound the file.

Thom Loverro, the reporter for *The Easton Express* had been providing regular newspaper accounts of the criminal proceedings concerning Boettger. On March 31, 1982, Loverro attended a suppression hearing concerning the wiretap evidence. The court denied the motion to suppress from the bench. Following the hearing, Loverro went to the Clerk of the Office of Criminal Court and requested to see Boettger's file. The Clerk of the Office of the Criminal Court, following normal procedures and noting no restrictions as to access or disclosure, gave the reporter the file for public inspection. Loverro proceeded to take notes directly from the wiretap transcript including direct quotations. Loverro then returned to his office and composed a regular news story which included certain quotes from the transcript. Loverro discussed with his editors whether or not to publish the article containing the quotations from the wiretap transcript. These discussions resulted in the withholding of the publication of the quotations until the hearing judge had issued a written order holding that the recording had been conducted in conformity with state and federal laws. *The Easton Express* published Loverro's article on April 7, 1982. Subsequent to the publication of the article, Boettger entered a plea of nollo contendere to the criminal charges, and was sentenced to pay a criminal fine.

Respondent brought suit against the Easton Publishing Company and its reporter, Mr. Loverro alleging common law invasion of privacy and violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978 (the Act), 18 Pa. Cons. Stat. § 5701, et seq. Respondent sought civil damages under § 5725 of the Act which provides for actual damages (of not less than $1,000.00), punitive damages and reasonable attorney's fees and costs. The case went to trial in September of 1983. During the course of the trial respondent withdrew his invasion of privacy claim and dis-

missed Mr. Loverro as a defendant. At the close of the evidence, the court directed a verdict for the respondent on the issue of liability. The court further instructed the jury that they were required to award respondent a minimum of $1,000.00 in liquidated damages under § 5725 (1) of the Act, as well as reasonable attorney's fees and costs. The jury awarded respondent the statutory minimum of $1,000.00 and attorney's fees and costs of $17,409.34. The jury declined to award additional actual damages or punitive damages.

Petitioner filed a motion for judgment notwithstanding the verdict and for a new trial. In its post trial motions, petitioner challenged the constitutionality of the statute. Petitioner argued that the effect of the Act was to civilly punish the publication of material lawfully obtained from public records and that the statute operated as an unconstitutional prior restraint on publication. Petitioner also argued that the common law fair report privilege constituted a defense, and argued that it had relied in good faith on a court order. On March 6, 1984, petitioner's post trial motions were denied.

On appeal, the Pennsylvania Superior Court, relying upon prior decisions of this Court, held that § 5725 of the Act as applied in this case violated the First Amendment and reversed the judgment below. The Supreme Court of Pennsylvania reversed, upholding the constitutionality of the Act and holding that the First Amendment did not protect the publication in question. Petitioners filed a timely Petition for reargument with the Supreme Court of Pennsylvania which was denied on May 18, 1989.

PRELIMINARY STATEMENT

In *The Florida Star* v. *B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816 (1989), decided by this Court on June 21, 1989, Justice White in his dissenting opinion identified this case and noted: "The Court's decision today [in *Florida Star*] suggests that this ruling by the Pennsylvania Court was erroneous." *Id.*, 57

U.S.L.W. at 4823 n.4. While Justice White indicated that he would "strike the balance as the Pennsylvania Court did," the majority opinion in *Florida Star* mandates reversal of this case.

Petitioner respectfully requests this court to grant the Petition for Certiorari. Alternatively, because this decision departs dramatically from the long line of decisions from *Cox Broadcasting* to *Florida Star*, petitioner respectfully urges this court to summarily reverse the decision of the Supreme Court of Pennsylvania. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311-12 (1977) (Petition for Certiorari granted and judgment summarily reversed when court's ruling abridges freedom of the press).

I. THE CHALLENGED STATUTE WHICH IMPOSES CIVIL LIABILITY FOR PUBLISHING TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM STATE COURT FILES OPEN TO THE PUBLIC VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The decision of the Supreme Court of Pennsylvania in this case departs dramatically from well settled First Amendment principles as set forth in five decisions of this Court. The case before the bar is another in the line of cases which began with *Cox Broadcasting Corp.* v. *Cohn* 420 U.S. 469 (1975), continued with *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977), *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and culminated in *The Florida Star* v. *B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816 (1989).

The decision of the Supreme Court of Pennsylvania conflicts most dramatically with this Court's recent decision in *Florida Star*. The facts in the case at bar and those of *Florida Star* are closely analogous. In this case, a reporter, in viewing a court file which was clearly accessible to the general public, discovered information concerning a wiretapping operation.

This information was later published in *The Easton Express*, a daily newspaper owned by the Easton Publishing Company. In *Florida Star*, this Court held that the publication of a rape victim's name which was ascertained from police reports made available to the general public, and which was truthful information, was constitutionally protected speech and that the imposition of civil damages pursuant to a statutory enactment violated the First Amendment due to the absence of a state interest of the highest order. As in the instant case, *Florida Star* involved a state statute which authorized awarding civil damages upon a finding that a publication violated the statute. In striking down the Florida statute, this Court held that: "where the government itself provided the information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.*, at 57 U.S.L.W. at 4817. This principle clearly controls the instant case. The dictates of *Florida Star* mandate that the Commonwealth of Pennsylvania could have protected the privacy interest of the individual involved in this case in a far less restrictive manner than by civilly punishing the publication of truthful speech.

The prior decisions of this Court, which were considered, and rejected by the Supreme Court of Pennsylvania, similarly mandate reversal. In *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975), this Court determined that a state cause of action for damages for invasion of privacy in connection with the publication of the name of a deceased rape victim which was ascertained in a court file available for public inspection violated the First and Fourteenth Amendments of the United States Constitution. In making this determination, this Court considered the direct confrontation between the constitutional freedoms of speech and press and the claims of the right to privacy. *Id.* at 489. This Court specifically held in *Cox Broadcasting* that the interests in privacy fade where the information appears in the public record. *Id.* at 494. In *Oklahoma Publishing Co.* v. *District*

Court, 430 U.S. 308 (1977), this Court summarily reversed a pretrial order of a state court enjoining the news media from publishing, broadcasting and disseminating the name or picture of a child involved in a juvenile proceeding. As in this case, the reporters in *Oklahoma Publishing* determined the identity of the individual from access to files which were available for the viewing of the general public and which was not restricted by the court or any other public agency. In *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), this Court adjudged a statute unconstitutional which imposed criminal penalties for divulging truthful information regarding proceedings before a confidential state judicial review commission. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), this Court reaffirmed its reasoning in the decisions heretofore described by holding as unconstitutional a state statute which made it a crime for a newspaper to publish the name of a juvenile charged as a youthful offender without the written approval of a court as this punished the truthful publication of information. In *Daily Mail*, this Court noted that whether a statute is viewed as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information was not dispositive because both require the highest degree of state interest to sustain their validity. *Id.* at 101-102.

The Constitutional principles announced in these cases were further refined in *Florida Star*. Therein, this Court reaffirmed the well established rule that the First and Fourteenth Amendments protect the publication of information from government files which is lawfully obtained. The case before this Court presents an even more compelling factual basis for protecting the publication in question because, as in *Cox Broadcasting*, the information was obtained from "courthouse records open to public inspection" *Id.*, 57 U.S.L.W. at 4819, citing *Cox Broadcasting* v. *Cohn*, 420 U.S. 469 (1975). A principal reason this Court gave for invalidating the challenged damage award in *Cox Broadcasting* was the important role played by the press in "subjecting criminal proceedings

to public scrutiny and thereby guaranteeing their fairness." *Florida Star*, 57 U.S.L.W. at 4819, citing, *Cox Broadcasting* 420 U.S. at 492-93.

In *Cox Broadcasting* Justice White clearly recognized that considerations of personal privacy are greatly diminished once information appears in public court records, 420 U.S. at 494-95. Justice White further reasoned that making public records generally available to the media, while allowing their publication to be punished would invite "self censorship and very likely lead to the suppression of many items that . . . should be made available to the public." *Id.*, at 496. This case falls squarely within the strictures of *Cox Broadcasting*; which clearly prohibits the punishment of truthful publication of information lawfully obtained from public court records.

The Pennsylvania Statute, 18 Pa. Cons. Stat. § 5725 must fall under the principles announced by this Court in *Florida Star*. "Where a newspaper publishes truthful information which it has lawfully obtained, punishment may be imposed, only when narrowly tailored to a state interest of the highest order." __ U.S. __, 57 U.S.L.W. at 4820. The analysis in *Florida Star* is based upon this Court's holding in *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). *Daily Mail*, sets forth the criteria for First Amendment protection in this context. First, the information must be "lawfully obtained." Second, punishment of the publication must be to further a "state interest of the highest order." Third, the court must consider the "timidity and self censorship" inherent in a state statute which punishes the publication of accurate information obtained from public court files. *Florida Star* ___ U.S.___, 57 U.S.L.W. at 4818-19.

The application of the *Daily Mail* principles as reannounced in *Florida Star* to the facts of this case clearly mandates reversal of the decision below.

A. THE NEWSPAPER LAWFULLY OBTAINED TRUTHFUL INFORMATION CONCERNING A MATTER OF PUBLIC SIGNIFICANCE FROM PUBLIC COURT RECORDS

It is undisputed that the newspaper account of the wiretap conversation involving the respondent was a fair and accurate representation of the transcript which appeared in the court files of the criminal proceedings in which respondent Boettger was a defendant. Boettger's conversation was intercepted pursuant to a statutorily authorized wiretap. Boettger unsuccessfully sought to suppress the wiretap evidence and he subsequently entered a plea of nolo contendere to charges of conspiracy to commit bookmaking and pool selling. Upon his conviction, respondent was sentenced to pay a criminal fine. Prior to the suppression hearing, the District Attorney in charge of the case placed a transcript of the wiretap conversation into the case file making the transcript available to the public. Immediately following the suppression hearing Thom Loverro, the reporter for *The Easton Express*, requested access to the court file and was presented a copy of the file for review by the clerk. Upon reviewing the file, Lovarro took extensive notes, returned to his office and began writing a story based upon the excerpts taken from the wiretaps. The story appeared several days later, on April 7, 1982, following the court's issuance of an order denying the suppression motion.

The judicial system placed the transcript of the intercepted communication into a public file. Because of this *public* disclosure, the transcript became accessible to all members of the community, including the press. The information was clearly a public record which was "lawfully obtained."

There can be no doubt that the subject of the article in question was a "matter of public significance." This Court has repeatedly stressed the importance of public access to judicial proceedings and public access to information concerning those proceedings. In *Richmond Newspapers, Inc.* v.

Virginia, 448 U.S. 555 (1980), this Court held that the First and Fourteenth Amendments guarantee the public the right to attend criminal trials. *Id.*, at 583. In so doing this Court emphasized that the First Amendment's core purpose is to assure freedom of communication on matters relating to the function of government generally, and criminal trials specifically.

> Plainly it would be difficult to single out any aspect of higher concern and importance to the people than the manner in which criminal trials are conducted.

Id., at 575.

Similarly, in *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976), this Court rejected the use of a prior restraint to prohibit the press from reporting the details of a crime, its investigation, and what transpired in an open courtroom.

These cases make it clear that protecting the free-flow of information concerning the functioning of our criminal justice system is a central purpose of the First Amendment. The publication of the information in this case is clearly of the highest public significance, addressing as it does the prosecution of a member of the community charged with violating criminal statutes prohibiting bookmaking, and other forms of gambling activities.

B. THE CHALLENGED STATUTE DOES NOT PROTECT A STATE INTEREST OF THE HIGHEST ORDER

Protection of the privacy rights of an individual accused and subsequently convicted of a criminal offense does not rise to the level of a "state interest of the highest order," particularly where, as here, those privacy rights were previously violated by the public officials charged with safeguarding those rights in the first instance. This proposition was made clear in *Florida Star*.

[W]here government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a press room open to the public. Florida's policy against disclosure of rape victims' identities, reflected in Section 794.03, was undercut by the Department's failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be narrowly tailored means of safeguarding anonymity. See *supra*, at 9. Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Cox Broadcasting*, 420 U.S., at 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy, and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

That appellant gained access to the information in question through a government news release makes it especially likely that, if liability were to be imposed, self-censorship would result. Reliance on a news release is a paradigmatically "routine newspaper reporting techniqu[e]." *Daily Mail*, 443 U.S., at 103. The government's issuance of such a release,

> without qualification, can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further.

___ U.S. ___, 57 U.S.L.W. at 4817-18.

All of the factors identified by this Court in *Florida Star* are present in this case. *The Easton Express* relied upon a similar "paradigmatically 'routine newspaper reporting technique'" namely, examination of court files available to the public in the office of the clerk. Petitioner was entitled to rely upon the public availability of the wiretap transcript and should not be subject to civil liability because the government abrogated its statutory duties to maintain the confidentiality of certain classes of documents.[2]

The statute fails to meet the "state interest of the highest order" test for yet a second reason. The interest sought to be protected, presumably the "privacy" of persons who are the subject of criminal prosecutions, is a far less compelling interest than the protection of the privacy of a rape victim. The latter interest was held to be insufficient to meet the First Amendment standard in *Florida Star*.

As Justice White pointed out, the plaintiff in *Florida Star* was the victim of a traumatic and violent crime. Following the publication of her name, she received "harassing

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[2]The trial court was strongly critical of the district attorneys failure to comply with the statute.

> Unfortunately, the District Attorney's safekeeping of the recordings *was in total noncompliance with the governing statute*. No application was ever made for their sealing under the direction of the court. Moreover, no attempt was made to place the records in the custody of court; nor, was the court given the opportunity to monitor disclosure. See *Wiretapping and Electronic Surveillance Control Act*, 18 Pa. C.S.A. §5714(b) and §5715 (emphasis added).

Appendix D at 2d, n.2.

phone calls, required mental health counseling, was forced to move from her home and was even threatened with being raped again." *Id.*, 57 U.S.L.W. at 4821 (White, J., dissenting). The plaintiff in *Florida Star* was a highly vulnerable victim of a crime who suffered actual damages as a consequence of the publication.

By contrast, the respondent in this case presents a far less compelling case. Far from being an innocent victim, respondent Boettger was the perpetrator of criminal activities for which he was convicted and sentenced to pay a criminal fine. Moreover, the jury found that respondent suffered no actual damages and was not entitled to punitive damages.

The criminal proceedings against the respondent were the subject of extensive press coverage prior to the publication of the wiretap transcript. In the overall context of the criminal proceedings resulting in the conviction of the respondent, the publication of the actual telephone conversation which formed the basis of the case against him cannot be viewed as a substantial intrusion into his privacy. The protection of individual privacy in this context is clearly not a "state interest of the highest order."

C. A CIVIL ACTION PUNISHING THE PUBLICATION OF TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM COURT RECORDS WILL RESULT IN SELF-CENSORSHIP

As this Court held in *Florida Star*, civilly punishing the publication of information obtained from public records and published in reliance thereon will inevitably lead to self-censorship.

> A third and final consideration is the "timidity and self-censorship" which may result from allowing the media to be punished for publishing certain truthful information. *Cox Broadcasting, supra*, at 496. *Cox Broadcasting* noted this concern with overdeterrence in the context of information made

> public through official court records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

___ U.S. ___, 57 U.S.L.W. at 4819

There can be no question that the newspaper in this case relied upon the public availability of the wiretap transcript. A rule requiring the public and the press to second guess the actions of the district attorney's office in making materials available in public files would inevitably lead to self censorship.

Other federal and state courts have been virtually unanimous in adhering to the constitutional principles announced by this Court in *Cox Broadcasting, Oklahoma Publishing Co., Landmark Communications,* and *Daily Mail. Worrell Newspapers of Indiana, Inc.* v. *Westhafer*, 739 F.2d 1219, 1221, 1223 (7th Cir. 1984) (criminal statute prohibiting publication of names of person indicted under seal violates First Amendment); *WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981) (only the highest state interest justifies statute prohibiting publication of name of victim of sexual offense); *State* v. *Stauffer Communications, Inc.*, 592 P.2d 891 (Kan. 1979) (First Amendment prohibits criminal statute punishing publication of facts from public records concerning arrest warrants); *Ayers* v. *Lee Enterprises*, 561 P.2d 998 (Or. 1977) (privacy action based upon state's Public Records Act prohibiting disclosure of victim's name violates First Amendment).

This Court and other courts throughout this country have overwhelmingly adopted the well settled constitutional principles rejected by the Supreme Court of Pennsylvania in this case.

II. THE CHALLENGED STATUTE'S IMPOSITION OF STRICT LIABILITY IN THE FORM OF AN IRREBUTABLE PRESUMPTION OF INVASION OF PRIVACY VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

This Court has consistently held that strict liability in any form is impermissible where First Amendment interests are involved. This principle was clearly set forth in *Florida Star*.

> A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the *per se* theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern — because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person.

___ U.S. ___, 57 U.S.L.W. at 4820.

Like the statute in *Florida Star*, the Pennsylvania statute creates an irrebuttable presumption that the plaintiff's privacy interests have been violated from the fact of publication alone.[3] This presumption precludes the case-by-case analysis of the reasonableness of the publication in light of surrounding publicity.

In *Florida Star*, Justice Marshall characterized the scheme of strict liability as engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence. *Id.*

Justice Marshall also recognized the close relationship between constitutional protection available to libel defendants and those applicable to publishers of truthful information.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court rejected the common law rule of strict liability in libel actions involving private persons.

> Our decisions recognize that a rule of strict liability that compels a publisher or a broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

---

[3]While § 5703 of the Act imposes the narrow "scienter" requirement of a "willful disclosure" of the contents of a wire communication, strict liability remains inherent in the presumption of an invasion of privacy which is presumed from the fact of publication. Moreover, the publisher of the newspaper in *Florida Star* clearly knew that he was publishing the name of a rape victim and therefore willfully disclosed the information just as the newspaper in this case willfully disclosed the wiretap transcript.

Id., at 340. The *Gertz* Court went on to characterize its decision in *New York Times Co.* vs. *Sullivan*, 376 U.S. 254 (1964), as a rejection of "the *common law* of strict liability for libel and slander." *Id.*, at 344.

While the Pennsylvania statute requires a "willful disclosure," it does not require proof of any of the other elements of invasion of privacy. And most significantly, *truth* is not a defense under § 5725.

In another recent examination of First Amendment principles limiting governmentally imposed tort sanctions against speech and press, this Court squarely rejected the imposition of strict liability, reasoning that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubtedly 'chilling' effect on speech . . . " *Hustler Magazine, Inc.* v. *Falwell*, ____U.S.____, 99 L.Ed 2d 41, 50 (1988).

This case proceeded solely upon a statutorily based strict liability theory. The common law invasion of privacy claim was voluntarily dismissed by the respondent at trial. Finding that *The Easton Express* article fell within the purview of Section 5725, the trial judge directed a verdict for respondent on the question of liability and issued a binding instruction to the jury with respect thereto. Pursuant to the statute the jury was further instructed that they were required to award respondent not less than $1,000 in liquidated damages. The jury found that respondent had suffered no actual damages and was not entitled to punitive damages in connection with publication of the wiretap transcript summary. Respondent was not required to prove any of the elements of invasion of privacy and petitioner was not permitted to argue that its publication was reasonable and unoffensive in light of the publicity surrounding Boettger's arrest, denial of his suppression motion, and subsequent conviction.

The statute in this case which imposes strict liability in the form of an irrebutable presumption for truthful speech, is

contrary to those rulings which were adopted in order to provide breathing space to avoid media self-censorship. Our constitutional heritage carefully protects each step in finding and publishing the truth. That heritage allows some defamatory speech to occur. The Supreme Court of Pennsylvania has departed from this heritage in upholding, as constitutional under our First Amendment, a statute which imposes strict liability in the form of an irrebutable presumption for publishing truthful information.

> Acknowledging the power of government to regulate the content of the news invites its use and admits no limiting principle.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. of Educ. v. *Barnett*, 319 U.S. 624, 641 (1943).

CONCLUSION

Prior decisions of this Court clearly prohibit civil and criminal sanctions for the publication of truthful information obtained from public court files or information obtained from state agencies. The Supreme Court of Pennsylvania's opinion has validated such a statute. Pennsylvania Code, 18 Pa. Cons. Stat. § 5725, is clearly unconstitutional under prior precedent from this Court. If allowed to stand, the holding below will continue to have a severe negative impact upon

news gathering and publishing activities which are clearly protected by the First Amendment. For these reasons, this Court is respectfully requested to grant the Petition for Certiorari and give this case full consideration on the merits.

Alternatively, this Court is requested to grant certiorari and summarily reverse the holding of the Supreme Court of Pennsylvania in light of this Court's opinion in *Florida Star* v. *B.J.F.* Where a court order or holding abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is particularly appropriate. *Oklahoma Publishing Company* v. *District Court*, 430 U.S. 308, 311-12 (1979)(Petition for Certiorari granted and judgment summarily reversed where court's order abridges freedom of the press).

Respectfully submitted,

*Paul L. O'Brien
Arthur D. McKey
Hanson, O'Brien, Birney & Butler
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 298-6161

Thomas P. Stitt, Sr.
April L. Cordts
Stitt & Cordts
Meridian Bank Building
Suite 408
Easton, Pennsylvania 18044
(215) 253-9111

Attorneys for Petitioner

*Counsel of Record

APPENDIX A

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Respondent* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY, *Petitioner*	No. 31 E.D. Appeal Dkt. 1987 Petition for Reargument and Application for Relief Filed: May 18, 1989

ORDER

PER CURIAM

The Petition for Reargument and Application for Relief are denied.

Messrs. Justice Larsen and Justice McDermott did not participate in the consideration or decision of this case.

TRUE COPY FROM RECORD
ATTEST: May 19, 1989

/s/

PATRICK TASSOS,
Deputy Prothonotary
Supreme Court of Pennsylvania
for the Eastern District

APPENDIX B

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant*	No. 31 E.D. Appeal Docket 1987
v.	
THOM LOVERRO AND EASTON PUBLISHING COMPANY	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the SUPERIOR COURT, be, and the same is hereby reversed and the judgment of the Court of Common Pleas of Northampton County is reinstated.

/s/

MARLENE F. LACHMAN, Esq.
Prothonotary

Dated: March 8, 1989

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY, *Appellees*	No. 31 E.D. Appeal Docket 1987 Appeal from the Order of the Superior Court in Nos. 984 and 1035 Philadelphia, 1984 Entered January 3, 1986, Reversing the Order of the Court of Common Pleas of Northampton County in No. 1982-C-2846 Entered March 6, 1984, Denying Plaintiff's and Defendants' Motion for Post-Trial Relief and Entering Final Judgment on the Verdict 349 Pa. Super. 134, ___ A.2d ___ (1986) ARGUED: November 10, 1987

OPINION

JUSTICE ZAPPALA FILED: March 8, 1989

In this appeal we review an Order of the Superior Court reversing an Order of the Court of Common Pleas of Northampton County denying all parties' cross-motions for post-trial relief and entering final judgment on a jury verdict rendered in favor of Appellant. That verdict resulted from a civil action brought by Appellant against Appellee, Easton Pub-

lishing Company and one of its reporters, Thom Loverro, under § 5725 of the Wiretapping and Surveillance Control Act (Act) 18 Pa.C.S. § 5701 et seq. Section 5725 provides a civil cause of action for damages incurred due to the unlawful disclosure or use of a wire or oral communication obtained pursuant to or in violation of the Act. The trial court, in rejecting Appellee's motion, took the position that the Act created a limited right of disclosure which previously had not existed and therefor, notwithstanding the status of Appellee as "the press", "[the Legislature] evidences an overiding legislative concern for the protection of privacy. Thus, we believe that *all* disclosures and uses of wiretap information must be in strict compliance with the Act." Opinion of Common Pleas Court at 8. (Filed, March 6, 1984) (emphasis added).

The Superior Court, in reversing the trial court, created an implied exemption from liability as to the media for violation of the disclosure provisions where the disclosure was of legitimate public concern and lawfully obtained from court records accessible to the public. We granted allocatur to determine, as a question of first impression, whether or not such an exemption should be read into § 5725. After carefully reviewing the provisions of the Act, we hold that the Act makes no provision for a media exemption nor need one be implied.

Both lower courts found the facts to be largely undisputed and those relevant to the disposition of this appeal indicate that on November 17, 1981, the State Police secured a wiretap permit from the Attorney General pursuant to § 5704(2)(ii) of the Act. At the request of the State Police, a private individual, known to Appellant, consented to a telephone tap between himself and the Appellant. Shortly thereafter, the State Police intercepted a telephone conversation between Appellant and the consenting individual which revealed the Appellant's involvement in illegal betting activities on college football games. Based upon the information

obtained from the intercept, the State Police raided Appellant's home and charged him with bookmaking, pool selling and conspiracy. After being held for court on the charges, Appellant filed a timely motion for discovery, requesting the District Attorney produce a transcript of the intercepted call. Inadvertently, but in violation of the disclosure section of the Act, 18 Pa.C.S. § 5717(b), the District Attorney attached a copy of the transcript to his answer and filed it with the clerk of courts. No attempt was made by the District Attorney to direct the clerk to impound the file as required by § 5714(b) of the Act.

On March 31, 1982, a suppression hearing was held on Appellant's motion to suppress the introduction of the intercepted communication. One of the observers present at the hearing was Thom Loverro, a reporter for the Easton Express, a newspaper owned by Appellee's publishing company. Loverro expected that the hearing would disclose the contents of the wiretap, however, the hearing judge disposed of the motion without such disclosure. Following the hearing, Loverro went to the office of the clerk of court and requested the case file. The file was made available to Loverro, who discovered the transcript of the interception which had been attached to the District Attorney's answer to Appellant's discovery request. Loverro made extensive notes on the contents of the transcript and subsequently wrote a story based upon those notes. He withheld publication of the story for approximately seven days, however, while he discussed the matter with his superiors. On April 7, 1982, the managing editor approved publication and the article was published with excerpts of Loverro's notes from the transcript.

After the publication, Appellant filed a lawsuit against Easton Publishing Company and Loverro predicated upon the common law tort of invasion of privacy and the statutory civil action created by § 5725. Subsequently, Loverro was dropped as a defendant and the common law invasion of privacy count was withdrawn. Following trial on the action,

the trial judge directed a verdict in favor of Appellant as to the issue of liability. The jury then returned a verdict of $1,000 in actual damages, no punitive damages, and $17,409.43 in attorney's fees. The court en banc dismissed Appellant's post-trial assertion that punitive damages were mandatory, and likewise dismissed Appellee's motion for judgment n.o.v., attacking the directed verdict on various grounds.

In reversing the court en banc's interpretation of the Act, the Superior Court reasoned that while Appellee had indeed violated the Act by its publication of the article containing portions of the transcript, to sustain the media's liability for that violation would be a constitutional transgression and therefore deemed it necessary to imply a "media exemption" in the Act to preserve its constitutionality. Our reading of the Act together with other relevant Pennsylvania precedent, however, leads us to conclude that the exemption created by the Superior Court is unnecessary.

Pennsylvania's Wiretapping and Surveillance Control Act, is a pervasive scheme of legislation which suspends an individual's constitutional right to privacy only for the limited purpose of permitting law enforcement officials, upon a showing of probable cause, to gather evidence necessary to bring about a criminal prosecution and conviction. The statute sets forth clearly and unambiguously by whom and under what circumstances these otherwise illegal practices and their derivitive fruits may be used. Section 5703 of the Act, sets

forth the specific prohibition against the interception and disclosure of these materials

> **§ 5703. Interception, disclosure or use of wire or oral communications**
>
> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:
>
> . . .
>
> (2) *willfully discloses* or endeavors to disclose to any other person the contents of any wire or oral communication or evidence derived therefrom, knowing, or *having reason to know* that the information was obtained through the interception of a wire or oral communication; . . . (emphasis added)

In addition, § 5717 of the Act sets forth the exclusive and unequivocal circumstances under which disclosure of intercepted wire or oral communications are permitted. They are:

> *(a) Investigative activities.*
> — Any investigative or law enforcement officer . . . may disclose such contents or evidence to another investigative or law enforcement officer or make use of such contents . . .
>
> . . .
>
> *(c) Otherwise authorized personnel.*
> — Any person who, by any means authorized by the laws of another state or the Federal Government, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence to an investigative or law enforcement officer and may disclose such contents or evidence where otherwise admissible while giving testimony under oath or affirmation in any proceeding in any court of this Commonwealth.

Additionally, § 5725 of the Act provides for a civil cause of action for the unlawful interception, disclosure or use of wire or oral communications. That section provides:

> . . . Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept disclose or use such communication . . .

Section 5715 requires that any transcript derived from such electronic surveillance be sealed. Section 5725 provides a defense to the civil action if the defendant acted in good faith reliance on a court order or the provisions in this chapter.

The Superior Court, interpreting the above sections of the Act, agreed with the lower court determination that Appellee's reporter was not a person statutorily authorized to disclose the communications in question. In publishing the newspaper article containing quotations from the transcript, Appellee therefore both disclosed and used Appellant's intercepted conversation in violation of the Act.

In addition, the court found that the specific and only defense provided by § 5725(c) was not available to Appellee inasmuch as there existed no court order directing the clerk to unseal the transcript and make it available to either Appellee or the general public. In these findings we concur. We also accept the Superior Court's determination that §611 of the Restatement (2nd) of Torts, Fair Report Privilege, is not applicable to Appellee inasmuch as the transcript did not satisfy the §611 requirement that the published defamatory material be "contained in a report of an official action or proceeding or of a meeting open to the public and dealing with matters of public concern". Id.

We depart from the rationale of the Superior Court, however, where it concludes that it must, of necessity, fashion

an implied privilege for the sole benefit of the media in order to maintain the constitutionality of the Act. In support of its holding, the court relies on federal Supreme Court precedent set forth in *Smith* v. *Daily Mill Publishing Company*, 433 U.S. 102 (1979); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1979); *Landmark Communications Inc.* v. *Virginia*, 435 U.S. 829 (1978) and *Oklahoma Publishing Company* v. *District Court of Oklahoma*, 430 U.S. 308 (1977).

In predicating its decision on this line of cases, the Superior Court concluded that the facts of the instant case were indistinguishable from the factual situations presented in those cases. For the reasons that follow, we disagree.

In *McLaughlin* v. *Philadelphia Newspapers Inc.*, 465 Pa. 104, 348 A.2d 376 (1975), this Court held that under the First Amendment to the United States Constitution, the press enjoyed no greater right of access to information than that afforded to the general public. There is cogent reasoning for this principle; for what is the media if not the eyes, ears and, at times, the alter ego of the public? As such, there is no justification to allow the media a unique prerogative to trespass where the general populace is barred. Were we to affirm the decision of the Superior Court, we would effectively be bestowing upon the media a preeminent right to which they are not entitled. The Act is clear as to who is authorized to violate a citizen's right to privacy. That authority is limited to the enumerated law enforcement officials functioning in conformity with the limited purpose of the Act.

Having determined that a privilege for the media does not appear on the face of the Act, we must determine whether the Act, when applied to the facts before us, can be differentiated from the *Cox*, *Landmark Communications* line of cases in a manner that will preserve the vitality of the Act.

The common thread running through the *Cox* line of cases is the Constitutional tenet that a state may not impose prior restraint or penal sanction upon the media for publish-

ing lawfully obtained, truthful information contained in official court records open to public inspection. In *Cox*, the Supreme Court invalidated a Georgia statute which prohibited the news media from publishing or broadcasting the name or identity of a rape victim and provided misdemeanor penalties for its violation. A reporter for Cox had obtained the name of a rape victim by examining copies of indictments handed to him in open court by a clerk, and subsequently caused the indentity of the victim to be broadcast; an act for which Cox was sued civilly by the victim's father. The Court, in pronouncing the statute constitutionally infirm, indicated that the operant factor in its holding was that the prohibited sanction applied to information "from judicial records which are maintained in connection with a public prosecution and *which themselves are open to public inspection.*" 420 U.S. at 491 (emphasis added) (In effect, the statute prohibited the media from disclosing what was otherwise public knowledge).

Similarly, in *Oklahoma Publishing Co.*, the Court struck down legislation prohibiting publication of the name and picture of a juvenile defendant. The identity of the juvenile was acquired by reporters solely through their presence at open court proceedings. Correspondingly, in *Smith*, the Court held that West Virginia could not punish truthful publication of an alleged juvenile delinquent's name where the information was lawfully obtained. In this instance, the identity was gleaned by monitoring police radio frequencies and querying eyewitnesses to the crime. Finally, in *Landmark Communications*, the case most analogous to the instant facts, the Court held that Virginia could not impose criminal sanctions on the media for publishing confidential information relating to judicial disciplinary proceedings in violation of its state constitution and statutory law.

Having thoroughly examined the reasoning behind these decisions, it is clear that the case before us is sui generis and therefore does not require the result produced below. Initially, the present case is distinguishable from the *Cox* ratio-

nale by virtue of the fact that the information sought to be prohibited in those cases was of a type legally and publicly obtainable either from official court records *intentionally* placed in the public domain, or from information readily obtainable through attendance in open court. In contrast, in this case the information was neither readily obtainable in open court nor *intentionally* placed in records accessible to the general public. Since the Act requires that all transcripts be sealed until such time as there is disclosure, it cannot be said that the transcript obtained by Appellee's reporter was officially placed in the court record and intended to be accessible to the public. The statute clearly sets forth the mandatory sealing of the transcript and its ability to be disclosed by one not authorized *only* upon a court order. *See* 18 Pa.C.S. §§5715 and 5725(c).

Unfortunately, the attachment of the transcript to the District Attorney's answer to the discovery motion corrupts the straightforward disposition of this case. We are not inclined however to obviate the otherwise confidential nature of the transcript based solely upon its happenstance discovery by Appellee's reporter in an otherwise public record. It is of legal and public record that information obtained through the Act *shall* be sealed and that "[t]he presence of the seal provided by this section, *or a satisfactory explanation for its absence*, shall be a *prerequisite* for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under §5717(b)." 18 Pa.C.S. §5714 (emphasis added).

Since the statute neither prohibits nor sanctions the mere possession of transcripts, but only their disclosure, the very possession of the notes from the transcript by Appellee and/or its reporter did not constitute a violation until such time as the actual disclosure of this information was accomplished.

The more proximate and difficult holding we must reconcile with the case before us is the circumstances presented

in *Landmark Communications, supra.* In *Landmark*, confidential information concerning the disciplinary actions taken against a judge by the Virginia Judicial Inquiry and Review Commission was obtained in violation of a Virginia code which made it unlawful to divulge the identification of a judge when he was the subject of an investigation and hearing by the commission. The statute provided criminal penalties for its violation. The United States Supreme Court defined the narrow and limited question as "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the judicial inquiry and review commission. 435 U.S. at 837 (footnote omitted). The court held that it did not and based its decision on the fact that neither the Commonwealth's interest in protecting the reputation of its judges nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech here at issue. Interestingly, the court declined to completely answer the broader question, unquestionably germane to the present inquiry and first acknowledged, but not decided, in *Cox*, which asks whether the publication of truthful information, withheld by law from the public domain, enjoys a similar privilege as does public information released to the general public in official court records? This is the precise question now before us. The *Landmark* court declined to address all the implications of this question but would decide it only in relation to the unique circumstances presented there, to wit, whether that specific publication enjoyed such a privilege.

It is clear from our reading that the holding in *Landmark* is, of necessity, limited to its particular facts. The operant factors in the decision were a penal statute and the balancing of First Amendment rights versus the state's interest in protecting the reputation of its judges and maintaining the institutional integrity of its court.

Distinguishing the case before us from *Landmark*, we note here, we are not dealing with a penal sanction but a civil one.[1] Additionally, the interest sought to be balanced in *Landmark*, the right to the reputation of judges and maintaining the integrity of the courts weighs much more heavily upon the side of First Amendment privilege, that interest being directly related to government and the public's interest in scrutiny of its function.

Before us, however, are two equally weighted fundamental interests which, because of their unique nature, we find operate to tip the scale in the opposite direction of the counterpoise established in *Landmark*. Those interests are the right of a citizen of this Commonwealth to enjoy privacy and, the specifically enumerated right of our citizens to protect their reputation. Pennsylvania Constitution, Article I, §11.

The right to privacy in the present case is a much stronger interest than the privacy interest weighed by the United States Supreme Court in *Cox* and its progeny. This is true for the privacy interests in *Cox* were viewed in terms of the disclosure of information otherwise of public record. In contrast, the privacy interest we now consider consists of information gathered in temporary derogation of a Pennsylvania citizen's right to privacy and protected by our Commonwealth through a pervasive legislative scheme uncompromisingly delineating and limiting its collection and use. Weighing these interests against those contained in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates. To understand our rationale in minimalizing the interest of the newspaper, it is important to bear in mind that, but for the

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[1]We note parenthetically that the Act does provide criminal sanctions for its violation. 18 Pa.C.S.A. §5703, 5719, however, the Appellee not having been charged under that section, the question is reserved for another day.

enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited. From this we reason that *only* when the protected information is disseminated either through an order of court unsealing it or through its use as evidence in an open court proceeding does the media's interest rise above those of the Commonwealth and its citizens.

Because we find no fault with the explicit language of the Act, we hold that information validly gathered pursuant to the provisions of the Act may not be disclosed, except under the limited mechanisms found in the Act, even though one not authorized to disclose such information obtains it through inadvertance or other means.

Therefore, the order of the Superior Court is reversed and the judgment of the Court of Common Pleas of Northampton County is reinstated.

Messrs. Justice Larsen and Justice McDermott did not participate in the consideration or decision of this case.

Mr. Chief Justice Nix files a Dissenting Opinion.

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY	No. 31 E.D. Appeal Dkt. 1987 Appeal from Order of Superior Court entered January 3, 1986, at Nos. 984 and 1035 Philadelphia 1984, Reversing Order of Court of Common Pleas of Northampton County, Civil Division, entered March 6, 1984, at No. 1982-C-2846 ___ Pa. Super. ___, ___ A.2d ___ (1986) ARGUED: November 10, 1987

DISSENTING OPINION

NIX, C. J. FILED: March 8, 1989

I dissent.

Today the majority holds that a newspaper is liable in a civil action under Section 5725 of the Wiretapping and Surveillance Control Act (Act), 18 Pa.C.S. § 5725, for publishing the contents of an intercepted communication obtained by one of its reporters from a public court file. The majority's disposition of this appeal ignores a vital fact in these circumstances, *i.e.*, that the transcript was publicly disclosed by the district attorney, who mistakenly attached it to a public court document.

The Act provides for the judicial maintenance of the secrecy of the recordings and supporting documents of intercepted communications in Sections 5714-5716. The recordings, along with any transcripts, orders and reports, must be sealed, held in custody, and disclosed only under certain conditions.

The disclosure in this case resulted from the inadvertence of the judicial system. Having placed the transcript within the public file, the members of the press, like anyone else in the community, had access to it and had no personal obligation to maintain the secrecy of the documents. The fact that the transcript is supposed to be kept secret is not directed at the person who accesses it in a public file, but is directed at the persons entrusted to keep it secret. That is the judicial system.

Thus, the burden for securing the secrecy of the transcripts was placed by statute on the judicial system which failed, in this instance, to sustain that burden. It is the judicial system which is responsible for the *public* disclosure of the transcript for once it became a part of the public file, it became accessible to the public, including the press. To place the onus on the newspaper to keep secret that which is public knowledge seriously conflicts with the First Amendment rights guaranteed by the United States Constitution. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978). Although the majority attempts to distinguish *Landmark, supra*, from the case at bar, its distinction remains unconvincing. In *Landmark*, the United States Supreme Court held that the First Amendment does not permit criminal prosecution of a newspaper for publishing truthful information regarding confidential judicial proceedings. Here the newspaper published information from a public file which it could properly have presumed to be public knowledge. Clearly the right involved here "lies near[er] the core of the First Amendment" protection. *Id.* at 839.

For all of the foregoing reasons, I dissent.

APPENDIX C

ALFRED R. BOETTGER v. THOM LOVERRO AND EASTON PUBLISHING COMPANY APPEAL OF EASTON PUBLISHING COMPANY	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 00984-PHILA. 1984
ALFRED R. BOETTGER *Appellant* v. THOM LEVERRO AND EASTON PUBLISHING COMPANY	No. 1035 PHILA. 1984

Appeal from the Judgment in the
Court of Common Pleas of Northampton County,
Civil No. 1982-C-2846

PANEL CASE FILED JANUARY 3, 1986

BEFORE: SPAETH, P.J., JOHNSON AND SHOYER*, J.J.

OPINION BY SPAETH, P.J.:

This appeal is from a judgment awarding damages to appellee under Section 5725 of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. §§5701 *et seq.*[1] Appellant, a newspaper, published an article containing quotations from the transcript of appellee's wiretapped conversations. The transcript was attached to the Commonwealth's answer to a motion for discovery, filed inci-

*The Honorable Kendall H. SHOYER, Senior Judge of the Court of Common Pleas of Philadelphia County, is sitting by designation.

[1]Section 5725 of the Act provides:

§5725. Civil action for unlawful interception, disclosure or use of wire or oral communication

(footnote continues)

dent to the prosecution of appellee, and was given to one of appellant's reporters by the clerk of the court. In addition to statutory and constitutional arguments, appellant argues that it is exempt from liability for publishing information of legitimate public concern obtained from court records accessible to the public. We agree that when enacting section 5725, the General Assembly intended such an exemption. We therefore reverse and enter judgment for appellant.

I

The trial court has summarized the facts, which it noted were largely undisputed, as follows:

> On November 17, 1981, the state police secured a wiretap permit from the Attorney General. Under the permit, a private citizen named Wayne Dickinson consented to a phone tap. On November 19,

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(footnote continued)

(a) Cause of action.—Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.—To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.—It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

1981, the state police intercepted a telephone conversation between the plaintiff [appellee] and Dickinson. During the conversation, plaintiff revealed his involvement in the acceptance of illegal bets on college football games. On December 12, 1981, the state police raided plaintiff's home. After the search, he was arrested on charges of bookmaking, pool selling and conspiracy. A preliminary hearing resulted in the charges being bound over for criminal court. On February 9, 1982, a motion for discovery was filed in the criminal case. The motion included a request for production of a transcript of the wiretap. Inadvertently,[1] the district attorney attached a copy of the transcript to his answer and filed it with the clerk of court. To make matters even worse, the district attorney did not direct the clerk to impound the file.

With these highly sensitve records lying outside the court's direct supervision, the stage was set for the unusual happenings which subsequently took place. On March 31, 1982, a suppression hearing was held in the criminal case. The hearing was open to the public. Among the observers was Thom Loverro, a reporter for the Easton Express.[3] He covered the hearing because he expected that the evidence would disclose the contents of the wiretaps. But, he did not get his story in the courtroom. As he sat there, the hearing judge disposed of the motion to suppress without ever getting into the contents of the tapes. When the hearing ended, Loverro went to the office of the clerk of court; and, he asked to see the case file.[4] Not being subject to impoundment, it was made available to him. In the file, Loverro discovered a transcript of the wiretaps. He made extensive notes of its content. Later that same day, he returned to his office and began writing a story based

upon the excerpts taken from the transcript of the wiretaps. However, the story was withheld for approximately seven days. In the meantime, Loverro discussed the running of the story with his superiors. On April 7, 1982, the managing editor approved publication. The newspaper article contained quotations from the transcript of the wiretaps.

3. A newspaper of daily circulation published by the defendant [appellant].

4. The evidence does not establish whether or not Loverro knew that the transcript could be found there.

Slip op. of tr. ct. at 2-3.

Appellee's complaint, which was filed on April 13, 1982, named as defendants both appellant, as the publisher of the Easton Express, and its reporter, Loverro. Appellee sought to recover on two grounds: the common law tort of invasion of privacy, and the cause of action for unlawful disclosure or use created by section 5725. During the trial, in September 1983, Loverro was dropped as a defendant, N.T. 130-31, and the action for invasion of privacy was withdrawn, *id.*, 91. The trial court denied appellant's requested points for charge and directed a verdict in favor of appellee on the issue of liability for unlawful disclosure or use, appellant excepting to the direction. The jury then returned a verdict of $1,000 actual damages (the statutory minimum), no punitive damages, and $17,409.43 for attorney's fees. Appellant filed a timely motion for judgment n.o.v. or new trial. On March 6, 1984, the court en banc, composed of the trial judge alone, denied the motion. Judgment was entered and this appeal followed.

II

We may first consider appellant's argument that when read literally, section 5725 does not make unlawful appellant's publication of a newspaper article containing quotations from the transcript of appellee's wiretapped conversations. The argument may be disposed of summarily.

Section 5725 creates a cause of action against "any person who intercepts, discloses or uses" the communication of another person when that communication has been "disclosed . . . in violation of this chapter." 18 Pa.C.S. §5725(a). The disclosure by the clerk of court of the transcript of appellee's wiretapped conversations was in violation of the Act, for the transcript was required by the Act to be sealed, 18 Pa.C.S. §5715, and had it been sealed, appellant would have had no right to see it, *Commonwealth* v. *Frattarola,* 336 Pa.Super. 411, 485 A.2d 1147 (1984). In publishing the newspaper article containing quotations from the transcript, appellant both "disclose[d]" and "use[d]" appellee's intercepted communication.

Appellant argues that it acted "with a subjective good faith belief that they [appellant and its reporter] acted legally pursuant to a court order and that the belief was reasonable." Brief for Appellant at 24. Subsection (c) of section 5725 does provide that "good faith reliance on a court order" is a defense to an action for unlawful disclosure or use. Had there been a court order directing the clerk to unseal the transcript of appellee's wiretapped conversations, this defense might have been available to appellant, but there was no such order.

III

We may consider appellant's remaining two arguments together. These arguments are: that appellant is exempt from liability under section 5725 because the information it published was of legitimate public concern and was obtained from court records accessible to the public; and that if sec-

tion 5725 does seek to impose liability on appellant, it is unconstitutional as a violation of the freedom of the press protected by the First and Fourteenth Amendments of the United States Constitution.

Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points for charge, and motion for judgment n.o.v., argued that it is exempt from liability under section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in the Restatement (Second) of Torts §611 (1976).[2] Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved. The argument is nevertheless before us indirectly, or, so to speak, by the back door.

As we have just discussed, literally read, section 5725 proscribes appellant's conduct. The question therefore arises whether the section *should* be literally read, or whether appellant is correct that we should read into the section an exemption recognizing a privilege to publish information that is of legitimate public concern and that was obtained from court records accessible to the public. In considering whether to find such an exemption implied in section 5725, we must ask whether the failure to find the exemption implied might

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[2]The Fair Report Privilege applies to defamatory matter:

> Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.
>
> Restatement (Second) of Torts §611 (1976).

See Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 439 A.2d 652 (1981) (adopting section 611).

render the section unconstitutional. For it is a settled principle of statutory construction that the legislature does not intend to violate the Constitution, and if as applied to appellant, section 5725 when literally read would violate the Constitution, we must consider whether an alternative construction, such as finding an implied exemption, will save the section. *Triumph Hosiery Mills, Inc.* v. *Commonwealth*, 469 Pa. 92, 96, 364 A.2d 919, 921 (1976) ("[O]ur duty [is] 'to declare a statute constitutional if this can reasonably be done,'" *citing Commonwealth* v. *Girard Life Insurance Co.*, 305 Pa. 558, 566, 158 A. 262, 264 (1932)), *appeal dismissed*, 429 U.S. 1083 (1977); *Commonwealth* v. *Rumsey*, 309 Pa.Super. 137, 139, 454 A.2d 1121, 1122 (1983) ("Legislative enactments are presumed valid, and will be stricken only if incapable of constitutional construction."); *Commonwealth* v. *Morgan*, 265 Pa.Super. 225, 248, 401 A.2d 1182, 1193 (1979) ("[W]here alternative constructions of a statute are possible, we must avoid a construction that would result in a statute's being struck down unnecessarily.").

-A-

In considering whether if literally read, section 5725 would violate the Constitution, we may start by recognizing that "[the United States Supreme Court's] recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Of these recent decisions, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), is particularly in point.

In *Cox* the issue was "whether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime." *Id.* at 471. A Georgia statute made it a misdemeanor for the news media to publish or broadcast the name

or identity of a rape victim.[3] *Id.* at 471-72. In the course of criminal proceedings related to the rape, a reporter for Cox Broadcasting "approached the clerk of the court . . . and requested to see a copy of the indictments. In open court, [the reporter] was handed . . . both the murder and the rape indictments, and was allowed to examine fully [those] document[s]." *Id.* at 472, n. 3. By examining the indictments the reporter learned the name of the rape victim, and he revealed the name in a news report concerning the criminal proceedings, broadcast later the same day and again the next day on a television station owned by Cox Broadcasting. *Id.* at 472-74. The father of the rape victim brought an action for money damages alleging that his right to privacy had been invaded by the broadcast of his deceased daughter's name.

The trial court rejected Cox Broadcasting's claim under the First and Fourteenth Amendments, and, holding that the Georgia statute granted the father a civil remedy, granted summary judgment as to liability. *Id.* at 474. On appeal the Georgia Supreme Court found that the trial court erred in finding that the Georgia statute granted the father a civil remedy but nevertheless found that the father had adequately stated a cause of action for invasion of his right of privacy, and for a common law tort of public disclosure. *Id.* Noting that questions of fact remained to be determined, the Georgia

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[3] The Georgia statute provided:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

Ga. Code Ann. §26-9901 (1972).

Supreme Court reversed the order entering summary judgment and remanded for trial. *Id.* at 475. The Georgia Supreme Court agreed with the trial court's holding that the First and Fourteenth Amendments did not require judgment for Cox Broadcasting as a matter of law, *id.*, but later, in response to a motion for rehearing, held that the Georgia statute was a "legitimate limitation on the right of freedom of expression contained in the First Amendment," and that there was "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." *Id.*

On Cox Broadcasting's further appeal, the United States Supreme Court opened its discussion by acknowledging that "there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity." *Id.* at 487 (Court's emphasis; footnote omitted). The Court noted, however, that the issue before it was not the broad issue of the extent to which a State may "protect an area of privacy free from unwanted publicity in the press," *id.* at 491, but the much narrower issue of "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection," *id.* "We are convinced," the Court concluded, "that the State may not do so." *Id.* The Court explained:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of

> public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in offical court records open to public inspection.
>
> *Id.* at 495.

See also Smith v. *Daily Mail Publishing Co., supra* (State may not punish truthful publication of alleged juvenile delinquent's name where the information was lawfully obtained); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (reaffirming *Cox* and holding that State may not impose criminal sanctions on press for publishing, in violation of State Constitution and statutes, information relating to judicial disciplinary proceedings); *Oklahoma Publishing Co.* v. *District Court of Oklahoma*, 430 U.S. 308 (1977) (where reporters acquired information by being present at court proceedings, the name and picture of juvenile were "publicly revealed" and in the "public domain" as much as the name of the rape victim in *Cox*, and therefore injunction prohibiting publication of the information violated the First and Fourteenth Amendments).

In the present case, the information published by appellant was part of court records accessible to the public, as was true in *Cox*. In addition, the information was required to be sealed or otherwise treated as confidential, as was true in *Landmark Communications*. In *Cox*, *Landmark Communications*, and *Smith*, the defendant newspaper obtained the information in question in a lawful manner and reported it accurately. Appellant likewise obtained the information lawfully and reported it accurately. So far, therefore, the present case appears indistinguishable from *Cox*, *Landmark Communications*, and *Smith*.

The question remains whether the cases are distinguishable on the basis of the type of information involved — the

name of the deceased rape victim in *Cox*, the name of the judge being investigated in *Landmark Communications*, the name of the juvenile offender in *Smith*, and the transcripts of appellee's conversations here. We conclude that this is not a basis of distinction. The information here, like the information in *Smith*, was "about a matter of public significance," *Smith*, 443 U.S. at 103; and like the information in *Cox*, it involved "commission of crime, prosecution[] resulting from it, and judicial proceedings arising from the prosecution[], . . . without question events of legitimate concern to the public," *Cox*, 420 U.S. at 492. *Cf. Baker* v. *Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829 (1978) (disclosure of public facts, plaintiff's prior criminal record, not actionable as invasion of privacy); *State* v. *Stauffer Communications, Inc.*, 225 Kan. 540, 592 P.2d 891 (1979) (state cannot impose sanctions on news media for publishing information concerning unexecuted arrest warrant where such information taken from public records); *Rawlins* v. *Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975) (*Cox* applied to record ten years old); *Montesano* v. *Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081 (1983) (where information of juvenile offense obtained from public records, the probation and parole report prepared for sentencing for subsequent crime, media not liable for invasion of privacy), *cert. denied*, ____U.S.____, 104 S.Ct. 2172 (1984); *Shifflet* v. *Thomson Newspapers (Ohio), Inc.*, 69 Ohio St.2d 179, 431 N.E.2d 1014 (1982) (per curiam) (where reporter at expungement hearing and information reported truthfully, First and Fourteenth Amendments do not permit exposing press to liability; citing *Landmark Communications, Oklahoma Publishing*, and *Cox*); *Ayers* v. *Lee Enterprises, Inc.*, 277 Or. 527, 561 P.2d 998 (1977) (police report was public record and, following *Cox*, no liability for publishing name and address of rape victim); *Philadelphia Newspapers, Inc.* v. *Jerome*, 478 Pa. 484, 387 A.2d 425 (1978) (in upholding trial court's order limiting public access to suppression hearing, appellate court, citing *Oklahoma Publishing*, notes that trial court had no

authority to "gag" the press"), *appeal dismissed,* 443 U.S. 913 (1979); *Mark* v. *Seattle Times,* 96 Wash.2d 473, 635 P.2d 1081 (1981) (en banc) (information from affidavit of probable cause included in record privileged under *Cox*), *cert. denied,* 457 U.S. 1124 (1982).

-B-

Given *Cox, Landmark Communications,* and *Smith,* we are constrained to conclude that the legislature did not intend that section 5725 should be construed to impose liability on appellant for its publication of information of legitimate public concern lawfully obtained from court records accessible to the public. For if we were to give the section such a construction, its application to appellant would violate the First and Fourteenth Amendments. We therefore hold that included in the section is an implied exemption for the publication of lawfully obtained information of legitimate public concern. So construed, application of the section to appellant presents no constitutional issue. *Cf. Commonwealth* v. *Morgan, supra* (to preserve constitutionality of statute, phrase, "not manifestly appropriate to lawful uses it [instrument of crime] may have," construed to mean "manifestly inappropriate to lawful uses it may have").

We are confirmed in this conclusion by the application of one further principle of statutory construction. When the legislature enacts a statute after an interpretation of the law by a court of last resort, it will be assumed that the legislature intended the statute to incorporate that interpretation. 1 Pa.C.S. §1922(3). Here, the General Assembly enacted section 5725 as part of the Act of October 4, 1978, P.L. 331, No. 164, §2, after the United States Supreme Court's decisions in

Cox, Landmark Communications, and *Oklahoma Publishing.*[4] We may assume, therefore, that in enacting section 5725, the General Assembly did not intend to deprive appellant of the constitutional right of publication upheld in those decisions. Since the General Assembly did not specifically exempt such publication, it is reasonable to imply an exemption.[5]

Judgment reversed and judgment entered for appellant.

JOHNSON, J. files a Concurring Opinion.

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[4]Compare prior provisions: Act of July 16, 1957, P.L. 956, No. 411, §1, 15 P.S. §2443 [renumbered 18 P.S. §3742], repealed Act of Dec. 6, 1972, P.L. 1482, No. 334, §5; Act of Dec. 6, 1972, P.L. 1482, No. 334, §1, 18 Pa.C.S. §5704.

[5]Given this disposition, we do not address appellee's argument that he is intitled to punitive damages.

ALFRED R. BOETTGER v. THOM LOVERRO AND EASTON PUBLISHING COMPANY APPEAL OF EASTON PUBLISHING COMPANY	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 00984-PHILA. 1984
ALFRED R. BOETTGER *Appellant* v. THOM LEVERRO AND EASTON PUBLISHING COMPANY	No. 1035 PHILA. 1984

Appeal from the Judgment entered April 5, 1984,
Court of Common Pleas, Northampton County,
Civil Division at No. 1982-C-2846

FILED January 3, 1986

BEFORE: SPAETH, P.J., JOHNSON AND SHOYER,* JJ.

CONCURRING OPINION BY JOHNSON, J.:

I write separately because I do not believe that the manner in which the information was obtained from the clerk of court's office was within the legislature's contemplation when promulgating the Act. Once the transcripts were made a part of the unsealed case file, they became, for all intents and purposes, matters of public record. Appellant could not then willfully disclose or use the information in a manner which violated the law because, in my view, that information was no longer shrouded in the secrecy provided by the Wiretap Act. Any private citizen could have viewed the wiretap transcripts

*Judge SHOYER, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

in the clerk of court's office and would be no more or less subject to criminal or civil liability than appellant herein.

The principles of statutory construction analyzed by my esteemed brother are unquestionably valid, but I see no need to evaluate a possible constitutional conflict in this case to determine the intent of legislature. Moreover, I do not believe that a constitutional question is before us, indirectly or otherwise, because, as stated by the majority, it was not properly preserved. The majority's erudite discussion in Part III-A is, therefore, unnecessary to our disposition of this case.

I concur in the result reached by the majority in Part III-B that an implied exemption for the publication of lawfully obtained information of legitimate public concern is included in section 5725. In my mind, the discussion begins and ends here. I would, therefore, reverse the judgment simply on the basis that the trial court, as a matter of law, should not have found a statutory violation where none had occurred.

APPENDIX D

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION — LAW

ALFRED R. BOETTGER, *Plaintiff*	
vs.	No. 1982-C-2846
THOM LOVERRO and EASTON PUBLISHING COMPANY, *Defendants*	In Trespass

OPINION OF THE COURT EN BANC

This is an action to recover damages for breach of privacy arising from the divulgence of the contents of an intercepted telephone conversation. The jury returned a verdict for the plaintiff in the amount of $18,409.43. Presently before us for disposition are defendant's motion for a judgment n.o.v. or, in the alternative, a new trial, and plaintiff's motion for a new trial limited to damages.[1]

The facts are largely undisputed and may be summarized as follows: On November 17, 1981, the state police secured a wiretap permit from the Attorney General. Under the permit, a private citizen named Wayne Dickinson consented to a phone tap. On November 19, 1981, the state police intercepted a telephone conversation between the plaintiff and Dickinson. During the conversation, plaintiff revealed his involvement in the acceptance of illegal bets on college football games. On December 12, 1981, the state police raided plaintiff's home. After the search, he was

[1]The Court en Banc was composed of the trial judge alone pursuant to Pa. R.C.P. 227.2.

arrested on charges of bookmaking, pool selling and conspiracy. A preliminary hearing resulted in the charges being bound over for criminal court. On February 9, 1982, a motion for discovery was filed in the criminal case. The motion included a request for production of a transcript of the wiretap. Inadvertently,[2] the district attorney attached a copy of the transcript to his answer and filed it with the clerk of court. To make matters even worse, the district attorney did not direct the clerk to impound the file.

With these highly sensitive records lying outside the court's direct supervision, the stage was set for the unusual happenings which subsequently took place. On March 31, 1982, a suppression hearing was held in the criminal case. The hearing was open to the public. Among the observers was Thom Loverro, a reporter for the Easton Express.[3] He covered the hearing because he expected that the evidence would disclose the contents of the wiretaps. But, he did not get his story in the courtroom. As he sat there, the hearing judge disposed of the motion to suppress without ever getting into the contents of the tapes. When the hearing ended, Loverro went to the office of the clerk of court; and, he asked to see the case file.[4] Not being subject to impoundment, it was made available to him. In the file, Loverro discovered a transcript of the wiretaps. He made extensive notes of its content. Later that same day, he returned to his office and began writing a story based upon the excerpts taken from the transcript of the

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[2]We say inadvertently because there is no evidence that the district attorney knew his actions were in violation of the law. Unfortunately, the district attorney's safekeeping of the recordings was in total noncompliance with the governing statute. No application was ever made for their sealing under the direction of the court. Moreover, no attempt was made to place the records in the custody of court; nor, was the court given the opportunity to monitor disclosure. See *Wiretapping and Electronic Surveillance Control Act*, 18 Pa. C.S.A. § 5714(b) and § 5715.

[3]A newspaper of daily circulation published by the defendant.

[4]The evidence does not establish whether or not Loverro knew that the transcript could be found there.

wiretaps. However, the story was withheld for approximately seven days. In the meantime, Loverro discussed the running of the story with his superiors. On April 7, 1982, the managing editor approved publication. The newspaper article contained quotations from the transcript of the wiretaps.

I. DEFENDANT'S MOTION FOR JUDGMENT N.O.V.

Section 5703 of the Wiretapping and Electronic Surveillance Act[5] provides:

> "A person is guilty of a felony of the third degree if he:
>
> (omitting subparagraphs (1) and (2)) . . .
>
> (3) willfully uses or endeavors to use the contents of any wire or oral communications, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication."

Although the defendant was never charged with the above criminal offense, it was sued under Section 5725 of Act, which reads:

> "(a) Cause of action. — Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communications;

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[5]Act of October 4, 1978, P.L. 831, 18 Pa. C.S.A. § 5701 et seq., effective December 1978. This Act repealed the Invasion of Privacy Act previously enacted on December 6, 1972.

and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred."

The trial judge gave binding instructions under which the jury was told to find the defendant liable. In accordance with those instructions, the jury found no actual damages; they assessed liquidated damages for the one day of violation at the higher rate of $1,000,000. No award was made for punitive damages; however, attorneys' fee and other litigation costs were awarded in the amount of $17,409.43.

Defendant argues that the trial court erred in granting binding instructions in favor of the plaintiff. Furthermore, defendant contends that it is not liable under Section 5725 of the Wiretapping and Electronic Surveillance Act and, therefore, requests the entry of a judgment n.o.v. In asserting its non-liability as a matter of law, defendant raises three grounds: (1) the consent exception contained in the statute; (2) that the disclosure was not willful; and, (3) that it acted in good faith.

So far as point one is concerned, the contention lacks merit. Defendant relies on *Smith* v. *Cincinnati Post & Times*, 475 F.2d 740 (6th Cir. 1973). The case is factually distinguishable. In *Smith*, one of the parties to the conversation divulged its conents to the newspaper. Here, neither party consented to defendant's use of the intercepted message. Moreover, Section 5704 of our statute lists the permissible exceptions. Of the seven situations described, none fits the circumstances of this case. The fourth exception comes the closest. However, it applies to interception rather than disclo-

sure; and, even the fourth exception requires the consents of *all* parties to the communication. (Emphasis supplied.)

The second point is the heart of this case. It is uncontested that the defendant lawfully obtained the wiretap information from records open to public inspection. Defendant argues that once the information was lodged with the clerk of court through the district attorney's violation of the statute, the press was free to publish it. In other words, the press had the right to exploit the district attorney's faulty performance of his safekeeping responsibilities. We disagree. Granting that the defendant's access to the wiretap information did not result from its own unlawful conduct, the statute did not cease to operate. It is important to note that the statute is divisible. As such, it regulates not only the interception step but the disclosure and use, as well. When the statute deals with use, it becomes most restrictive in nature. In fact, the statute contemplates solely two uses for the contents of intercepted telephone conversations. One use is for investigative activities among law enforcement officers. See § 5717(a) of the Act, supra. The other use is as evidence in criminal proceedings. See § 5717(b) of the Act, supra. Even the most cursory reading of the use provisions establishes that the public, including the press, was not intended to know about the contents of wiretaps until an investigative or law enforcement officer was "giving testimony under oath or affirmation" in a "criminal proceeding in any court of this Commonwealth or of another state or of the United States."

On the surface, holding a newspaper liable for the use of wiretap information which literally "fell into its lap", may appear to create a dangerous precedent with respect to freedom of the press. This is not so when one digs a little deeper into the situation and considers the kind of invasion of privacy sanctioned by the statute.

Before the enactment of the Wiretapping and Surveillance Act of 1978, this case could not have arisen because not even the government was allowed to intercept telephone con-

versations. In arming law enforcement with this new investigative power, the legislature was so apprehensive about its misuse that an expiration date of five years was set, unless the Act was extended.[6] See § 3 of Act 1978, Oct. 4, P.L. 831, No. 164. This evidences an overriding legislative concern for the protection of privacy. Thus, we believe that all disclosures and uses of wiretap information must be in strict compliance with the Act.

In the case at bar, the defendant knew the information was produced by the state police via a wiretap. See Exhibits, story of April 7, 1982. Yet, defendant published the story without seeking a legal opinion from its lawyer. (Deposition of Loverro at pages 49-50; introduced at trial by video tape.) Under such circumstances, defendant's ignorance of the law was self-imposed. In addition, Loverro testified that knowledge of the statute would not have deterred him from using the intercepted private telephone conversations. (Deposition, p. 60; also introduced into evidence by video tape.) The imposition of liability is the only way to prevent a newspaper from so capitalizing on a breakdown in the statute. Private damage suits will give a large measure of incentive for compliance with the standards for proper use of information gained by wiretaps. See *Wrongful Interception — Civil Action*, 25 ALR Fed 759. After all, the information would not exist but for "legislative authorization". Accordingly, we cannot find any jurisdiction for permitting a newspaper to rely on the statute to gain the information, but to disavow its standards with regard to the place and time for use.

Defendant suggests that our interpretation of the statute amounts to a prior restraint. Once again, we disagree and reject defendant's challenge to the statute's constitutionality. In prior restraint cases, there is a presumption that the information may be published. And, that presumption cannot be removed until a hearing establishes reasons to restrict use of

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[6]Recently, the Act was extended by the legislature.

the information. The exact opposite presumption is applicable to information gained through a wiretap. Such information is illegal per se. Only the statute creates an exception to this general rule. However, the statute imposes its own set of restrictions. One of those restrictions provides that the sole public use which can be made of intercepted communications is as evidence in a criminal proceeding. § 5717(b), supra. Since the right to intercept private telephone conversations is a creature of the legislature, we believe that body has the power to prohibit dissemination of the contents until after the information becomes evidence in a judicial proceeding. Thus, the statute fixes when and where the individual loses the privacy of his telephone conversations. Here, the defendant violated the plaintiff's right to privacy by making premature use of the information before it became evidence.

Next defendant contends that the disclosure was not willful. An acceptable definition from Webster's Third New International Dictionary states that willful denotes an act done deliberately, or one which is self-determined, as distinguished from accidental. Defendant cites the following language from *United States* v. *Murdock*, 290 U.S. 389, 394-395, 54 S. Ct. 223, 78 L.Ed. 381 (1933), as an appropriate definition of willfulness:

> "The word (willful) often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act."

We are not certain that the criminal standard applies to this civil action. But, even assuming it does, such willful conduct is present here. After gaining access to the information, defendant waited approximately seven days to publish

it. Obviously, this delay reflects defendant's knowledge that highly sensitive information had fallen into its hands. Nevertheless, a determination was made to run the story without specific grounds for believing it was lawful. Relying solely on a general concept of "freedom of the press", defendant went ahead without seeking legal advice. We are satisfied that its conduct was marked by a careless disregard as to whether or not it had a right to publish the contents of private telephone conversations.

Defendant also argues that it acted in good faith reliance upon the court's suppression ruling. We need not give much consideration to this argument. Defendant knew that the contents of the intercepted telephone conversations had not been divulged in the suppression hearing. That is the very circumstance which sent its reporter, Loverro, scurrying to the clerk's office. What was published thereafter was gained outside the courtroom and not in it. In addition, the defendant cannot claim reliance upon the suppression ruling itself. It reads as follows:

> "AND NOW, this 31st day of March, 1982, the Court enters the following order: The motion for suppression of each defendant are hereby denied and dismissed." See Transcript of Continued Hearing, etc., March 31, 1982, at page 3.

The fact that defendant waited until the entry of the above order is of no significance. Nothing was divulged in the ruling. Hence, the first public disclosure is still traceable to acts done by the defendant rather than by the court. Moreover, we adopt the holding of *Citron* v. *Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982). There, good faith was rejected as a defense under an almost indentical federal statute in these words:

> " . . . the good faith defense simply does not apply to actions (civil or criminal) against persons not engaged in law enforcement. There exists no statutory procedure whereby such persons can

secure official authorization of interceptions they wish to make; thus, they will never be in a position to invoke the defense . . . " at p. 626.

II. DEFENDANT'S ALTERNATE MOTION FOR A NEW TRIAL

Once the trial court concluded that the statute prohibits the public use of "wiretapped" information other than as evidence in a criminal proceeding, there was no issue of fact for the jury concerning liability. This is so because it is undisputed that the defendant knew it was using the intercepted conversations in their "raw" state, and before the information had been introduced as evidence in a judicial proceeding. After a careful review of the statute, we remain convinced that this strict construction is necessary. Only in this way, can a proper balance be struck between the interest for effective law enforcement and the need to protect the individual right of privacy. As previously mentioned, the legislature's purpose in granting authorization for wiretapping was to assist law enforcement and not to create news. When that statutory purpose is kept in mind, there is no "chilling" effect on freedom of the press by requiring the media to wait until the information is used in court. If a newspaper voluntarily decides to violate the statutory format, then it should be held liable as a matter of law. Therefore, we affirm the trial court's binding instructions in favor of the plaintiff; and, defendant's motion for a new trial on the liability issue is denied.

III. PLAINTIFF'S MOTION FOR A NEW TRIAL LIMITED TO DAMAGES

Plaintiff argues that punitive damages are mandatory under § 5725 of the Act. We do not think so. Exemplary damages are allowed only when the act which creates actual damage also imports insult or outrage, and is committed with a view to oppress, or appears to have been committed in contempt of a plaintiff's rights. Although they have been allowed in certain cases, there must be present malice or

wanton conduct to justify the allowance. *Golomb* v. *Korus*, Pa. Super., 396 A.2d 430 (1978). We have no quarrel with plaintiff's reference to the mandatory construction usually afforded to the word "shall". However, in § 5725, "shall" is used in connection with the word "entitled" which means — to give a right to. Thus, § 5725 provides that the jury shall have the right to award punitive damages. Nonetheless, in exercising that right, the jury is bound by the law of this Commonwealth. In this case, plaintiff's entitlement to punitive damages was submitted to the jury. The submission was accompanied with an accurate statement of the applicable law. So instructed, the jury resolved the issue of punitive damages against the plaintiff. We find no reason to disturb the jury's verdict.

WHEREFORE, we enter the following:

ORDER OF COURT EN BANC

AND NOW, this 6th day of March, 1984, in accordance with the foregoing Opinion, it is ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion for a judgment n.o.v. is denied and dismissed.

2. Defendant's motion for a new trial, on both liability and damages, is denied and dismissed.

3. Plaintiff's motion for a new trial, limited only to damages, is denied and dismissed.

4. The prothonotary is directed to enter final judgment on the jury's verdict.

BY THE COURT,

/s/
MICHAEL V. FRANCIOSA,
Judge

Supreme Court, U.S.
FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-265

In The

Supreme Court of the United States

October Term 1989

EASTON PUBLISHING COMPANY

Petitioner,

vs.

ALFRED R. BOETTGER

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. ELLIOTT*
THOMAS R. ELLIOTT, JR.

POSWISTILO, ELLIOTT & ELLIOTT
Suite 201
1101 Building
11th and Northampton Streets
Easton, PA 18042
(215) 258-2374

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a state statute which creates a civil cause of action for unlawful disclosures of State-intercepted wire communications may be constitutionally applied to a newspaper which obtains intercepted telephone conversations through the illegal conduct of a third person and publishes them.

2. Whether the governmental interest in utilizing electronic surveillance for law-enforcement purposes is an interest of sufficient weight so as to justify limits on press disclosure and publication of intercepted telephone conversations obtained by a newspaper as a result of the unlawful act of a third person.

3. Whether a state statute which requires as an element of a civil cause of action proof of "willful" violation thereof, and prohibits use or disclosure of private telephone conversations, imposes strict liability in the form of an irrebuttable presumption of invasion of privacy.

RESPONDENT'S OBJECTION TO JURISDICTION IN RESPONSE TO PETITIONER'S SUPREME COURT RULE 21.1(b) AND 28.1 STATEMENT AND TO PETITIONER'S JURISDICTIONAL STATEMENT

The Petitioner failed to raise the issue of the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act until after the decision of the trial court, when it first challenged the constitutionality in its post-trial motions filed in the Court of Common Pleas of Northampton County, Pennsylvania. This failure resulted in the waiver of the issue by the Petitioner. See *Boettger v. Loverro*, 349 Pa. Super. 134, 502 A.2d 1310

RESPONDENT'S OBJECTION – Continued

(1986), rev'd on other grounds ___ Pa. ___, 555 A.2d 1234 (1989) as follows:

> Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points for charge, and motion for judgment n.o.v., argued that it is exempt from liability under section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in the Restatement (Second) of Torts §611 (1976). Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved.

Moreover, the Petitioner elected to dissolve and did dissolve itself while the case was on appeal within the Pennsylvania court system. The judgment entered against Petitioner in this action was paid to Respondent on April 20, 1989 pursuant to a writ of execution which was filed on March 27, 1989. The only apparent parties in interest are the shareholders of the former newspaper publisher, who have a speculative interest in the recovery of the judgment previously paid, but no concrete interest in the First Amendment issues raised by Petitioner's petition for writ of certiorari.

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SUMMARY OF ARGUMENT

The case is not appropriate for review. The constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act was raised too late by petitioner. The judgment against the petitioner was paid, and the petitioner is now dissolved.

Moreover, the decision which petitioners seek to have reviewed does not depart from settled First Amendment principles nor is it in conflict with prior decisions of this Court. To the contrary, no prior decisions have considered the substantial federal and state interests in the governmental authorization of electronic surveillance, which are directly implicated here.

Given those substantial federal and state interests in the continued availability of wiretapping as an effective instrument of law enforcement, and the serious risk that federal and state legislative authorizations will *all* be challenged, and ultimately fall, with the unconstitutionality of the inseparable limits on use and disclosure, this Court should deny review in this case. In any event, these interests are of sufficient magnitude to justify the imposition of civil damages for the willful violation by the press of a prohibition – which applies to the government and the general public as well as to the press – from using and disclosing the contents of intercepted wire communications except upon court order or when introduced as evidence in a criminal proceeding.

ARGUMENT

I. NO GRANT OF WRIT OF CERTIORARI IS WARRANTED BECAUSE THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT DEPART FROM SETTLED FIRST AMENDMENT PRINCIPLES NOR CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner Easton Publishing Company ("the Newspaper") urges upon the Court an absolutist view of First Amendment press publication rights that this Court has repeatedly eschewed, particularly in cases involving another fundamental right of constitutional dimension: the right of privacy.

The Newspaper's claim of entitlement – an absolute right which rises above the rights of all other members of the public to publish even private telephone conversations obtained by the Newspaper as a result of the unlawful act of another – sweeps far more broadly than any First Amendment principle enunciated by this Court. It would also corrode the stronghold of privacy which the Pennsylvania Legislature carefully constructed in its decision to confer upon the State the awesome power to electronically intercept private telephone conversations.

The Newspaper claims that this case is controlled by the line of cases whose progenitor is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and that it "departs dramatically from well-settled First Amendment principles". Petition for Writ of Certiorari ("Pet. for Cert.") at 8. This claim – as overbroad as the publication rights for which the Newspaper contends – is simply inconsistent

with this Court's repeated admonition that in cases involving the tension between First Amendment press rights and the protection accorded by law to personal privacy the Court was "resolving this conflict only as it arose in a discrete factual context". *The Florida Star v. B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816, 4817 (1989); *see also, Cox Broadcasting, supra,* 420 U.S. at 491 ("Rather than address the broader question . . . it is appropriate to focus on the narrower interface between press and privacy that this case represents."); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 840 (1978)("The broader question – whether the publication of truthful information withheld by law from the public domain is similarly privileged – was not reached in Cox . . . We need not address all the implications of that question here, but only whether in the *circumstances of this case* Landmark's publication is protected by the First Amendment" [emphasis supplied]).

In fact, as we discuss below, the decision of the Pennsylvania Supreme Court is not inconsistent with any prior decision of this Court. Instead it represents, as Justice White noted in his *Florida Star* dissent, a proper striking of the balance between press rights and the right of privacy. *See, Florida Star, supra,* 57 U.S.L.W. at 4823, n.4.

A. THIS CASE IS NOT CONTROLLED BY OR INCONSISTENT WITH THE COX BROADCASTING COMPANY LINE OF CASES.

We begin by carefully analyzing *Cox Broadcasting,* rather than merely invoking it in an *ipse dixit* fashion, as did the Newspaper. The Georgia statute in *Cox Broadcasting* made it a criminal offense "for any news media or any other person to print and publish, broadcast, televise or

disseminate through any other medium of public dissemination" the names or identities of female rape victims. In the course of publicly open criminal proceedings against several accused persons, a television reporter obtained information concerning the crime and, in addition, learned the name of the victim by inspecting the indictment itself, which was a public record routinely made available for public inspection. The reporter later broadcast a news report which revealed the victim's name. The victim's father then commenced a civil action against the broadcasting company for invasion of privacy premised upon the statutory violation and the common law. The Georgia Supreme Court later upheld the common law tort aspect of the case[1] against the broadcasting company's claim that its First Amendment freedom of expression precluded the imposition of liability.

This Court reversed on quite narrow grounds:

> Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case represents, namely, whether the State may impose

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[1] The Court found that the Georgia trial court had erred in concluding that the statute conferred a private civil right of action. This fact also distinguishes the instant case from *Cox Broadcasting*, because the Pennsylvania Legislature expressly conferred a private right of action for violations of the confidentiality safeguards of the wiretapping statute, and it is upon this express statutory right of action that the Boettger claim was based.

> sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

Cox Broadcasting, supra, 420 U.S. at 491.

The rationale for invalidating the Georgia statute was expressed as follows:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.
>
> * * *
>
> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.

Id., 420 U.S. at 495-496.

Cox does not invalidate the Pennsylvania statute involved here, for several reasons. In *Cox*, the privacy

interest at stake was mere identity: a person's name. Here, the privacy interest protected by the statute was one well-recognized and protected throughout numerous state and federal statutory enactments: the right to conduct telephone conversations in private, free from the intrusions of government except under extraordinarily limited circumstances necessitated by the need for societal protection through criminal law enforcement. Indeed, the intrusion made subject to civil liability was not merely the violation of privacy implied by eavesdropping, but rather the wholesale broadcasting of the contents of private conversations on the pages of a newspaper of general circulation.

The name of the rape victim in *Cox* was presumptively available to the press through a variety of news-gathering techniques, and happened to be obtained from the type of public record ordinarily available and open to the public: a criminal indictment.[2] In stark contrast, the private information published here – a transcription of the telephone conversation intercepted by the State – would not even have existed but for the Wiretapping and Electronic Surveillance Control Act.[3]

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[2] While *Cox* does not so indicate, the appearance in the criminal indictment of the name of the victim might well have been a *requirement* of Georgia law; the accused might well also have a constitutional right to know the identity of the accuser under the Confrontation Clause and other protections of the Sixth Amendment.

[3] The creation of this transcription, and thus the private information published, was carefully conditioned upon confidentiality strictures of the highest order by the Legislature. There is serious question whether the Legislature would ever

(Continued on following page)

Also, the privacy protection afforded by the Georgia statute involved in *Cox* was entirely one-dimensional, *i.e.*, the only place it sought to preserve the privacy of the victim's name was at the door of the news media. There were no other restrictions on the public availability of the victim's identity, and in fact, the names of such victims appear to have been universally displayed for public inspection on public records. In the instant case, unlike *Cox*, the information was entirely withheld *by statute from the public domain* until its actual admission into evidence in a criminal proceeding. The information was further made subject to detailed statutory procedures explicitly designed to safeguard the privacy of the conversations until that time. *See, e.g.*, 18 Pa.C.S.A. §§5714(b) and 5715. As recognized by the trial court, this case does not genuinely present the issue of whether the press has the right to publish information in public records ordinarily available to the public. It instead presents the issue of whether the press, unlike any other member of the public, had the right to exploit the unlawful act of the District Attorney in disclosing the intercepted conversations by improperly placing a transcript in a file which the Newspaper's reporter was permitted to inspect. The Pennsylvania Legislature cannot be criticized, as was Georgia's in *Cox*, for a failure to "respond by means which avoid

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have sanctioned the serious intrusion into privacy implied by State power to intercept telephone communications without its concomitant absolute prohibition on disclosure outside of a *criminal judicial* proceeding. *See,* 18 Pa.C.S.A. §5717(c).

public documentation or other exposure of private information". The Pennsylvania statute does just that: it prohibits any disclosure whatsoever of the intercepted conversations except to other law enforcement officers as needed for their official duties, or as evidence in the course of a criminal proceeding.

Unlike *Cox*, it cannot be suggested that "by placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served". Indeed, the diametrically opposite conclusion is compelled here because the transcripts surfaced in the office of the clerk of criminal courts only as a result of the direct violation of the statute authorizing the creation of the "information" in the first instance.

Finally, the Court must consider the nature of the "public record" or "court files" involved here. In *Cox*, the record was an indictment, an official written accusation found and presented by a legally chosen and sworn grand jury to a court of record, charging named defendants with various unlawful acts. Such a document is an exemplar of the type of public record of the manner in which criminal proceedings are conducted which must be subject to public scrutiny to guarantee fairness. *Cf., Florida Star*, 57 U.S.L.W. at 4818. In the instant case, the "public record" consisted of a completely unofficial and unverified transcript of an intercepted private telephone conversation, a document which on its face purported to be the type of information whose disclosure was proscribed by statute. The transcript was unlawfully

attached to an answer filed by an assistant district attorney[4] in response to a pretrial motion for relief and discovery. In fact, not only was the transcript wrongfully attached to the answer, but the pleading itself was not a necessary part of the clerk's file. *See* then-existing Pa. R. Crim. P. No. 308.[5] Surely this was not the type of "court record" which this Court intended to embrace by the phrase "official court records open to public inspection" which "by their very nature are of interest to those concerned with the administration of government. . . ." *Cox, supra,* 420 U.S. at 495.

Nor can the Newspaper seriously urge that Mr. Boettger's private telephone conversations are the "basic data of government operations" which this Court in *Cox* recognized the press has a "great responsibility" to report. *Cox,* 420 U.S. at 491-2. To the contrary, private telephone conversations are precisely *not* the "basic data of government operations". Instead, the privacy of telephone conversations is universally secured by law, subject only to extraordinarily limited exceptions. Indeed, the Pennsylvania Legislature preserved the confidentiality of even

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[4] The trial court charitably described the conduct of the district attorney as "inadvertent", recognizing nonetheless that it was unlawful: "the district attorney's safekeeping of the recordings was in total non-compliance with the governing statute". Appendix D to Pet. for Cert. at 2d, n.2.

[5] This rule was rescinded in 1983. At the time of the events here, the Rule provided in relevant part as follows: "(a). No answer to a pretrial motion is required unless ordered by the Court. Failure to file an answer shall not constitute an admission . . . unless an answer has been ordered by the Court".

such lawfully intercepted communications, permitted disclosure only to investigative or law enforcement and judicial officers for limited purposes, and imposed sanctions applicable to *any* person – including law enforcement officers – who unlawfully used or disclosed any intercepted communication. This State – through its political institutions – thus struck a balance among the competing interests: the law enforcement need for electronic surveillance, privacy interests, and the interests of the public to know and of the press to publish, as required by *Cox*.[6] *See Cox, supra*, 420 U.S. at 496.

The second case upon which the Newspaper relies is *Landmark Communications, Inc., supra*. There, this Court answered in the negative the question "whether . . . Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes". While, unlike in *Cox*, the statutes involved in *Landmark* did attempt to safeguard the confidentiality of the published information from its very inception – not merely at the doorstep of the media – the decision emphasized the First Amendment right of the press to report information concerning the performance of *public*

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[6] Indeed, the section of the statute extending a private right of action for unlawful disclosures also provides an absolute defense to liability if the actor "acted in good faith reliance on a court order or the provisions of this chapter". 18 Pa. C.S.A. §5725(c). In the Boettger trial, the Newspaper utterly failed to establish its entitlement to this defense.

duties by *public officials* free from fear of *criminal prosecution by the State itself*. This Court observed that the issue it was deciding was a "narrow and limited" one, *Id.* 435 U.S. at 837, and declined to "adopt the categorical approach" urged by the newspaper, *i.e.*, that "truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanction by the First Amendment". *Id.*, 435 U.S. 838-9.

Three circumstances of the *Landmark* case support this Court's narrow holding there and distinguish it from the instant case. First, it involved the imposition of *criminal sanctions by the State*, not a statutory civil privacy action for damages brought by a private individual. Second, it involved the publication of information relating to *secret governmental proceedings*, not the contents of a private telephone conversation. Third, it involved the performance of *public duties by a public official*, not the private conduct of a private individual. These circumstances led the Court to "conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment" since the publication "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect". *Id.*, 435 U.S. at 839. When one considers that the First Amendment was the response of the independent colonies to the use in England of Star Chamber proceedings to punish critics of the government for what was then called seditious libel, the holding of *Landmark* becomes manifestly proper. There is, as plainly, no reason for extending the narrow constitutional holding of Landmark to the unusual, if not unique, facts of the instant

case. Although these facts *involve* government operations in the sense that the State's interception of the communications created the "information" which the Newspaper reported, there is no issue here, as there was in *Landmark*, of "subjecting the police, prosecutors and judicial process to extensive public scrutiny and criticism". *Landmark*, 435 U.S. at 839, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Instead, the publication for which the civil action was commenced was solely the content of a private telephone conversation.

Nor does *Oklahoma Publishing Co. v. District Court in and for Oklahoma County, Oklahoma, et al.*, 430 U.S. 308 (1977) support the Newspaper's claim here. There, a pretrial order prohibited the publication of the identity or photograph of a minor child in connection with a juvenile proceeding. The name of the minor was disclosed in open court, with members of the press and other public present, despite the power of the court to close such juvenile proceedings to the public. Under various clearly applicable precedents, this Court concluded that there can be no restriction on the right of the press to report information adduced as evidence in a hearing or trial open to the public, or to report what transpires in a public judicial proceeding. *Oklahoma Publishing*, 430 U.S. at 311. But if the contents of Mr. Boettger's telephone conversations had been presented as evidence in open court in a trial or hearing open to the public, this case would not be before this Court.

The fourth case claimed by the Newspaper to require reversal here is *Smith v. Daily Mail Publishing Co., et al.*, 443 U.S. 97 (1979), also involving disclosure of the name of a minor involved in a juvenile proceeding. There, this

Court affirmed the issuance of a state court writ prohibiting county court officials from taking action on a criminal indictment charging two newspapers with violating a West Virginia statute making it a crime for a newspaper to publish the name of a minor in connection with a juvenile proceeding without court approval. This Court held that, in such circumstances, the State must demonstrate that the punitive action was necessary to further the asserted state interests, and that the asserted interest in protecting the anonymity of a juvenile offender was insufficient to justify the imposition of criminal penalties upon the press for reporting truthful information lawfully obtained about a matter of public significance.

Numerous factors distinguish *Daily Mail* from the instant case. First, the *Daily Mail* decision flatly noted that no privacy interest was at stake there: "there is no issue here of privacy". *Daily Mail, supra,* 443 U.S. at 105. But in the instant case, it is precisely privacy interests well-recognized by law that the Pennsylvania statute vindicates.

Second, *Daily Mail* involves the imposition of *criminal* penalties, which this Court found were unwarranted in view of the interest the State sought to protect. *Daily Mail,* 443 U.S. at 104 ("The magnitude of the State's interest in this statute is not sufficient to justify application of a *criminal penalty* to respondents") ("there is no evidence to demonstrate that the imposition of *criminal penalties* is necessary to protect the confidentiality of juvenile proceedings")[emphasis supplied].

Third, the Court noted that the statute's *approach* failed to pass constitutional muster because it applied

only to disclosures by *newspapers*, leaving television and radio broadcasts untouched. In *Daily Mail*, the name of the juvenile whose disclosure in a newspaper was criminalized was lawfully broadcast by three radio stations before one of the respondent newspapers published it. In the instant case, the statute prohibits *any* person – including investigative and law enforcement officers – from disclosing the contents of intercepted communications except in the manner and for the purposes mandated by the statute. Thus, the Newspaper here was subject to no more restriction than even those State officials directly entrusted with safeguarding the confidentiality of the intercepted communications.

Finally, the interests which this Court in *Daily Mail* was required to weigh against the First Amendment rights implicated in an indictment of news media for publication of lawfully obtained information were simply not vital enough to support the criminalization. As we discuss *infra*, pp. 20 to 26, the State interests involved here include its ability to utilize electronic surveillance for law-enforcement purposes; also, unlike *Daily Mail*, which involved no privacy interests whatsoever, this case directly implicates the individual right of privacy in telephone communications. Particularly in view of the fact that the West Virginia statute permitted other forms of mass media such as television and radio to broadcast with impunity the name of the juvenile offender, it was "difficult to take very seriously [the State's] asserted need to preserve the anonymity of its youthful offenders". *Daily Mail*, 442 U.S. at 110 (Rehnquist, J., concurring). In the instant case, even law enforcement officials are subject to civil actions for wrongful disclosures.

Thus, *Daily Mail* does not control the outcome of this case and establishes no applicable "settled First Amendment principles" from which the Pennsylvania Supreme Court "dramatically departed".

Finally, there is the *Florida Star* decision which the Newspaper repeatedly claims "mandates reversal". Pet. for Cert. at 8, 11, 22. The *Florida Star* majority analyzed the *Florida Star* case with reference to a particular "limited First Amendment principle": "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order". *Florida Star*, ___ U.S. ___, 57 U.S.L.W. at 4818.[7] But here, the information was a private telephone conversation, and did not, *per se*, concern the operation of government. In such circumstances, this Court recently stated:

> When the subject of [the information] is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the government is up to', the privacy interest . . . is at its apex while the . . . public interest in disclosure is at its nadir.

United States Department of Justice v. Reporters' Committee for Freedom of the Press, 489 U.S. ___, 57 U.S.L.W. 4373,

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[7] *But see, Florida Star*, 57 U.S.L.W. at 4822 ("Th[is] rule the Court takes as a given was thus offered only as a hypothesis in *Daily Mail*; it should not be so uncritically accepted as constitutional dogma".)(White, J., dissenting).

4382 (1989) (also recognizing privacy interest in compilation of criminal record information each component of which had already been placed in public domain).

Florida Star also noted that the government retains "ample means" of safeguarding privacy interests, and may "classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damage remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination". 57 U.S.L.W. at 4818-19. Indeed, Pennsylvania did all of those things in its Wiretapping and Electronic Surveillance Control Act. But those "ample means" were inadequate in fact.

Nevertheless, these features of the Pennsylvania statute clearly distinguish this case from the statute found constitutionally offensive in *Florida Star*. The Florida statute involved there apparently made it a crime only to "print, publish, or broadcast . . . in any instrument of mass communication" the name of a rape victim. *Florida Star*, 57 U.S.L.W. at 4816. Thus, the prohibition was limited to press publication or broadcast. And it is presumably for this reason, among others, that Justice Scalia was moved to observe in his *Florida Star* concurrence that "this law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself". *Florida Star*, 57 U.S.L.W. at 4821 (Scalia, J. concurring). Not so here: Pennsylvania's prohibition of disclosure of State-intercepted communications is quite nearly absolute, and applies with equal force to the government, to the press, and to any other person. It does not target mere press publication, but to any invasion of the

privacy interest involved in private telephone conversations. This fact also demonstrates that the Pennsylvania statute avoids the defect this Court noted in the statute involved in *Florida Star*: "underinclusiveness" and its failure to "satisfactorily accomplish its stated purpose". *Id.* at 4820. Unlike Florida, Pennsylvania did all it could to prohibit public disclosure, short of not intercepting any wire communications at all.

Florida Star also notes with concern the possibility of "timidity and self-censorship which may result from allowing the media to be punished for publishing certain truthful information". *Florida Star*, 57 U.S.L.W. at 4819, citing *Cox Broadcasting*, 420 U.S. at 496. This concern is premised on the "implied representation of the lawfulness of dissemination". *Florida Star, supra*. Yet there is no "implied representation" which could be relied on by the Newspaper here in the face of the statute which clearly made such disclosure unlawful, and which, like every citizen, the Newspaper must know at its peril. Unlike *Cox, Landmark, Daily Mail, Oklahoma Publishing*, and *Florida Star*, the Newspaper had access to the information it published only as a result of a violation of law under circumstances in which the law clearly declared that *further* dissemination was also prohibited. And in any event, whatever concern with "self-censorship" may be justified in the abstract, it is also clear here that the Newspaper was not timid in the slightest. In fact, the Newspaper's reporter boldly declared that even if he had known that his conduct violated the law, he would have done it anyway. Reproduced Record below, at 274a – 275a (Trial Transcript). Surely requiring the Newspaper, like every other citizen, to inquire what the law is or violate it at its

peril, is no more invitation to "self-censorship" than requiring it to make inquiries into the truthfulness of what it prints in order to avoid damages for libel.

Thus, neither does *Florida Star* compel the result sought here by the Newspaper.

II. UNRESTRICTED POWER OF THE MEDIA TO PUBLISH INFORMATION UNLAWFULLY DISCLOSED TO IT WOULD POSE GRAVE IMPLICATIONS FOR A WIDE VARIETY OF INTERESTS PROTECTED BY CONFIDENTIALITY PROVISIONS IMPOSED BY LAW.

Numerous state and federal statutes maintain the confidentiality, in varying degrees, of a wide variety of types of personal information. The rule truly sought here by the Newspaper is that the media are free to publish and broadcast – unrestrained even by the imposition of claims for actual damages – any such personal information, no matter how sensitive or private, so long as the Newspaper obtains the information in a manner in which the Newspaper *itself* does not violate the law and so long as the information finds its way into some article of a matter of public interest.[8]

---

[8] The "first inquiry" of *Florida Star* is whether the newspaper "lawfully obtained truthful information about a matter of public significance". 57 U.S.L.W. at 4819. The requirement is apparently satisfied when "the article *generally* as opposed to the specific identity, contained within it, involved a matter of . . . public import". *Id.* Thus, under this rule if followed to its logical conclusion, a Newspaper would be free to publish the name of an adoptive child and his or her abandoning mother if

(Continued on following page)

We select here just a sample of the types of information whose widespread disclosure – otherwise prohibited by statute – would be permitted by the Newspaper's expansive reading of the First Amendment.

For example, Pennsylvania's "Controlled Substance, Drug, Device and Cosmetic Act", 35 P.S. §780-101, *et seq.* provides for the expunction of records of arrest under the Act where the charges are withdrawn or dismissed or if the person charged is acquitted. 35 P.S. §780-119(a). The Act further provides that "No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly". *Id.*, 780-119(b). Also, "any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense". *Id.* But under the rule which the Newspaper seeks, it would be perfectly proper for the Newspaper – unlike any other member of the public – to publish the name of a person whose arrest was expunged so long as it got the information through someone *else*'s criminal act. Under the Newspaper's rule, it would involve a "matter of public importance", to wit: a criminal investigation.

(Continued from previous page)

it got the information "lawfully" but through a third person's statutory violation, and if the identities were published in an article about adoptions generally, a matter of "public import". Similarly, a Newspaper could publish, free of damages claims for invasion of privacy, the identity of an AIDS-afflicted youngster, so long as it somehow learned the information through a third person's breach of physician-patient confidentiality, and if it published the identity in an article about AIDS generally, a "matter of public import". We do not believe this Court intended such deep and expansive intrusions into personal privacy.

Similarly, the law of many states prohibits and makes actionable the public disclosure of confidential business information or trade secrets. But according to it, a Newspaper, unlike any other person, could publish to the world at large with impunity such confidential information so long as it received it through someone else's breach of fiduciary obligation, and so long it did so in connection with a "matter of public importance", which could conceivably be an article about the impending business plans of a large local employer.

We have by no means touched the perimeters of the societal damage and disruption which could be the result of the Newspaper's asserted claims.

III. THE INTERESTS OF THE COMMONWEALTH OF PENNSYLVANIA IN THE PRIVACY AND REPUTATION OF ITS CITIZENS, AND IN ITS CAPACITY TO FIGHT CRIME WITH THE USE OF WIRETAP INFORMATION AUTHORIZED "THROUGH A PERVASIVE LEGISLATIVE SCHEME UNCOMPROMISINGLY DELINEATING AND LIMITING ITS COLLECTION AND USE", ARE OF SUFFICIENT MAGNITUDE TO JUSTIFY THE EXTREMELY LIMITED RESTRICTIONS ON FIRST AMENDMENT PROTECTIONS PRESENTED BY THIS CASE

There is a significant State and public interest in the continued availability of electronic surveillance as a powerful instrument of law enforcement. But electronic surveillance was sanctioned by the Pennsylvania Legislature – and by the Congress of the United States of America in the instance of the federal wiretapping act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. §2510 *et seq.* – only because of the contemporaneously created use and disclosure limitations.

This interest in the availability of surveillance for law enforcement purposes, together with the interest in the State-constitutionally protected privacy of telephone conversations and in individual reputation which the Pennsylvania Legislature plainly intended to protect, provide a constitutionally sufficient foundation for the imposition of money damages against all persons, including newspaper publishers, who willfully violate the legislative safeguards.

The conflict between governmental interests in the ability to intercept and to preserve the security of wire, electronic and oral communications, and the press' First Amendment rights, if any, to access to those interceptions, has always been resolved in favor of governmental power to preserve the confidentiality of the interceptions until public disclosure has been authorized by a judge. *See, e.g., United States v. Cianfrani*, 573 F.2d 835, 856-857 (3rd Cir. 1978):

> Congress' overriding interest in protecting privacy to the maximum extent possible is evident in Title III. The legislative history of the statute emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement needs that the statute also sought to effectuate. Similarly, the complex and overlapping provisions are strong evidence that Congress intended to regulate strictly disclosure of intercepted communications, limiting the public revelations of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.

> Moreover, protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.
>
> We believe that the interest in protecting the privacy of communications is sufficiently weighty to justify some limitations in certain circumstances on the general right of access to court proceedings. And we believe that the circumstances of this case present the required strict and compelling necessity to justify a limitation on public access to the hearing held below. Only by allowing such limitations can we effectuate the congressional concerns evident in Title III and preserve the strength of that statute's provisions governing disclosure.

See also, Commonwealth v. Frattarola, 336 Pa. Super. 411, 419, 485 A.2d 1147, 1151-52 (1984)("The Pennsylvania wiretapping statute, 18 Pa.C.S.A. §§5710-5726, contains disclosure provisions similar to those found in Title III. The state act also limits disclosure until a determination of the lawfulness of the interception is made. Thus, the state statute, like the federal statute, prohibits public access to those portions of the transcript of the *Starks* hearing in which the contents of the tape recordings are discussed.") In *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct.

2210, 81 L.Ed.2d 31 (1984), this Court recognized that the state interest in the use of intercepted telephone conversations as evidence and in protecting the privacy interests of individuals against invasion by press publication of the contents of those communications "may well justify closing portions of a suppression hearing to the public" during which the contents of the tapes will be disclosed, even over the objection of defendants raising their Sixth Amendment right to a public trial.

While these cases address the issue of press *access* as opposed to press *publication* rights, it is clear that significant state and federal interests are presented by this case which go well beyond those articulated in *Cox, Oklahoma Publishing, Daily Mail* or *Florida Star*. The Supreme Court of Pennsylvania has described the Pennsylvania Wiretapping and Surveillance Control Act as "a pervasive scheme of legislation which suspends an individual's constitutional right of privacy only for the limited purpose of permitting law enforcement officials, upon a showing of probable cause, to gather evidence necessary to bring about a criminal prosecution and conviction. The statute sets forth clearly and unambiguously by whom and under what circumstances these otherwise illegal practices and their derivative fruit may be used." *Boettger v. Loverro*, ___ Pa. ___, 555 A.2d 1234, 1236-37 (1989). In conclusion, the Court stated:

> [T]he privacy interest we now consider consists of information gathered in temporary derogation of a Pennsylvania citizen's right to privacy and protected by our Commonwealth through a pervasive legislative scheme uncompromisingly delineating and limiting its collection and use. Weighing those interests against those contained

> in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates. To understand our rationale in minimizing the interest of the newspaper, it is important to bear in mind that, but for the enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited. From this we reason that *only* when the protected information is disseminated either through an order of court unsealing it or though its use as evidence in an open court proceeding does the media's interest rise above those of the Commonwealth and its citizens.
>
> Because we find no fault with the explicit language of the Act, we hold that information validly gathered pursuant to the provisions of the Act may not be disclosed, except under the limited mechanisms found in the Act, even though one not authorized to disclose such information obtains it through inadvertence or other means.

Id., ___ Pa. at ___, 555 A.2d at 1240 (emphasis in original). Given the interdependence of the statutory provisions authorizing interception and those limiting use and disclosure, if the federal and state governmental interests in strict limitations on use and disclosure cannot withstand constitutional scrutiny at the suit of the press, then the entire statute, including the legislative authorization for law enforcement officials to engage in the interception of wire, electronic, and oral communications, must fall as

well.[9] *See* 1 Pa.C.S.A. §1925, entitled "Constitutional construction of statutes", which provides:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, *unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application,* that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; *or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.*

See Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291 (1984)(holding a health care malpractice arbitration act unconstitutional in its entirety where its provisions were not "distinct", but "so interwoven as to be inseparable.") It is self-evident, we believe, that the strict prohibitions on use or disclosure of intercepted wire and electronic

---

[9] The comprehensiveness of the legislation at issue, and the interrelatedness of the interception and use and disclosure limitations, would mandate a second legislative look at the entire "pervasive legislative scheme" if this Court were to hold that the news media can disseminate the contents of wiretaps if governmental efforts to maintain confidentiality fail. Even after that second look, it is far from clear that legislative reapproval of the Act after the creation of a news media "exception" would survive the next challenge: that the Act denies equal protection of the laws by permitting the enforcement of the civil action provisions of the Act against the government and the general public, but not against the media.

communications are "essential" to and "inseparably connected with" those legislative provisions authorizing the interceptions themselves, and that the legislation authorizing interceptions is incomplete, and incapable of being executed in accordance with the legislative intent, unless confidentiality can be ensured.

IV. CIVIL LIABILITY UNDER THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT REQUIRES A WILLFUL VIOLATION. DEFENSES INCLUDE GOOD FAITH RELIANCE UPON A COURT ORDER OR UPON THE ACT ITSELF. THIS CASE DOES NOT PRESENT ISSUES OF STRICT LIABILITY.

Petitioner had standing, as a newspaper publisher, to seek and obtain a court order authorizing public access to and public disclosure of the contents of intercepted telephone conversations, or to secure an explanation for the absence of a seal on the transcript of the wiretap as required by the Act. It chose not to do so. The newspaper reporter who wrote the article making the unlawful disclosure testified at trial that it did not matter to him that the state had a law which prohibited public disclosure of intercepted telephone conversations without court authorization or the introduction of the intercepted conversations into evidence in a criminal proceeding. The trial court found that Petitioner had no specific grounds for believing that press publication of the wiretap transcripts was lawful; the court was satisfied that Petitioner's conduct was marked by a careless disregard as to whether or not it had a right to publish the contents of private

telephone conversations. *See, e.g., United States v. Murdock*, 290 U.S. 389, 394-96, 54 S.Ct. 223, 225-6, 78 L.Ed. 381 (1933); *Citron v. Citron*, 539 F. Supp. 621, 624-5 (S.D. N.Y. 1982). Quite obviously, the requirement of willfulness in the sense of careless or reckless disregard for a legal obligation satisfies whatever requirement of scienter can be discerned from the *Florida Star* case.

Moreover, the information disclosed in this case is by its very nature unlike that disclosed in *Florida Star*, and therefore does not involve the factual issues which this Court in *Florida Star* suggests may not be the subject of irrebuttable presumptions. Unlike the identity of a crime victim, the disclosure of which may or may not involve actual invasion of privacy issues, the content of intercepted wire or electronic communications involve privacy interests by their very nature. As stated by the Supreme Court of Pennsylvania:

> To understand our rationale in minimizing the interest of the newspaper, it is important to bear in mind that, but for the enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited.

Boettger v. Loverro, ___ Pa. at ___, 555 A.2d at 1240.

But for specific legislative authorization, telephone conversations are private and free from interception. Since the right to intercept and to make a record of those private conversations is purely a creature of the legislature, we submit that a prohibition on dissemination of the contents of intercepted conversations can be imposed by

the legislature without a specific factual determination on a case-by-case basis that such conversations are indeed private.

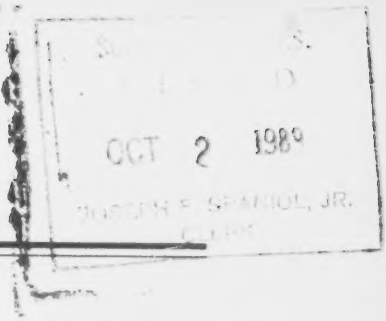
CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

*Charles W. Elliott
Thomas R. Elliott, Jr.
Poswistilo, Elliott & Elliott
1101 Building
11th and Northampton Streets
Easton, Pennsylvania 18042
(215) 258-2374

* Counsel of Record



No. 89-265

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

EASTON PUBLISHING COMPANY

Petitioner,

v.

ALFRED R. BOETTGER

Respondent.

REPLY BRIEF OF PETITIONER
EASTON PUBLISHING COMPANY TO RESPONDENTS
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

*PAUL L. O'BRIEN
ARTHUR D. MCKEY
Hanson, O'Brien, Birney & Butler
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 298-6161

THOMAS P. STITT, SR.
APRIL L. CORDTS
Stitt & Cordts
Meridian Bank Building
Suite 408
Easton, Pennsylvania 18044
(215) 253-9111

Attorneys for Petitioner

*Counsel of Record

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I. THIS COURT HAS JURISDICTION TO REVIEW THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED IN THIS PETITION.

As will be demonstrated below, the constitutional questions presented in this Petition were deemed by both State Appellate Courts to have been properly presented and said courts ruled upon the constitutionality of the challenged statute. Moreover, the former shareholders of Easton Publishing Company have a continuing financial interest in the outcome of this litigation as set forth in the Order of the Court of Common Pleas of Northampton County, Pennsylvania. Finally, the judgment in this case was never "paid". Rather, escrow funds to satisfy the original judgment in this case were removed from the escrow account without the knowledge or consent of the company's representatives. Moreover, Respondent is seeking additional attorney's fees and costs under the challenged statute.

A. The constitutional questions were properly raised and were reviewed by both State Appellate Courts and are therefore reviewable by this Court.

The constitutional issues presented in the Petition for Writ of Certiorari are properly presented for review by this Court. The issues were raised prior to the entry of the final judgment by the trial court in this matter.

Furthermore, both the intermediate appellate court and the Supreme Court of Pennsylvania passed judgment on the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978.

> Weighing these interests against those contained in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates.

Boettger v. *Loverro* ____ Pa. ____, 555 A.2d 1234 (1989). See Petition for Certiorari at 12b.

In addition, the constitutional questions were also considered by the Superior Court of Pennsylvania.

> Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points in charge, and motion for judgment n.o.v., argued that it is exempt from liability under Section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in Restatement (Second) of Torts Section 611 (1976). Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved. *The argument is nevertheless before us indirectly, or, so to speak through the back door.* (Emphasis added).

Boettger v. *Loverro* 349 Pa. Super. 134, 502 A.2d 1310 (1986), *rev'd on other grounds* ____ Pa. ____, 555 A.2d 1234 (1989). See Petition for Certiorari at 6c.

This Court has consistently held that when the highest court of a state passes on the constitutionality of a state statute and finds the state statute to be constitutional, such a decision is reviewable by the United States Supreme Court. *Dun & Bradstreet* v. *Greensmoss Builders, Inc.* 472 U.S. 749, 754, n.2 (1985), *citing, Orr* v. *Orr* 440 U.S. 268 (1979).

Furthermore, this Court has consistently held that where a matter of great constitutional import is apparent, that issue will be decided by this Court regardless of whether or not the said constitutional issue was presented by the writ of certiorari. *See, Erie R. Co.* v. *Tompkins* 304 U.S. 64 (1938).

In this case, not only was a matter of great constitutional importance raised by the Petition for Writ of Certioari but that same constitutional issue was the subject of the decision of the trial court, the intermediate appellate court and the Supreme Court of Pennsylvania. Accordingly the constitutional issue is properly preserved for consideration by this Court.

B. The former shareholders of Easton Publishing Company have a legally cognizable financial interest in the outcome of this litigation.

It is well settled that a case or controversy exists and a case may not be considered moot when the parties retain a "legally cognizable interest in the outcome." *United States Parole Comm'n.* v. *Geraghty*, 455 U.S. 388, 396 (1980), *citing*, *Powell* v. *McCormack*, 395 U.S. 486 (1969).

In this case, the former shareholders of Easton Publishing Company are entitled to the proceeds of funds placed in escrow to satisfy the judgment in this case in the event this Court reverses the decision below of the Supreme Court of Pennsylvania. See Jurisdictional Statement, Petition for Certiorari at i-ii.

The Order of the Court of Common Pleas, Northampton County, Pennsylvania (attached as Appendix A) which provides for the distribution and disbursement of the assets of Easton Publishing Company did not extinguish the rights of the former shareholders. On the contrary, the Order provides for the distribution of disputed funds as appropriate to the former shareholders at the conclusion of the litigation.

It is clear that the former shareholders of Easton Publishing Company retain the requisite "legally cognizable interest in the outcome" of this litigation.

C. Petitioner did not consent to the partial payment of the judgment and Respondent is seeking additional attorney's fees under the challenged statute.

In his Brief in Opposition to Petition for Certiorari, Respondent suggests that Petitioner consented to the payment of the judgment. This is not the case. Moreover, Respondent is seeking an additional $18,986.68 in attorney's fees and costs under the challenged statute which have *not* been paid.

During the pendency of the state court appeals in this case, the parties agreed to establish an escrow account with sufficient funds to enable the former shareholders of Easton Publishing Company to satisfy the initial judgment in the amount of $18,409.34. The account was opened with trial counsel for the respective parties as co-signatories. On or about April 20, 1989, counsel for the Respondent withdrew escrow funds without the knowledge or consent of counsel for the Petitioners.[1] See Affidavit of Ronald W. Shipman, Esquire, Case No. 1982-C-2846 (filed Sept. 29, 1989) in the Court of Common Pleas of Northhampton County, Pennsylvania, Civil Division-Law attached as Appendix B. Counsel for Petitioner has made demand upon counsel for Respondent to return said funds to the escrow account. See, Letter of April L. Cordts, Esquire, attached as Appendix C. No response has been received to this demand.

Moreover, Respondent is seeking an additional $17,574.50 in attorney's fees and $1,577.25 in "reasonable litigation expenses" under the challenged statute, the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5725. See, Petition for Award of Reasonable Attorney's Fees and Other Litigation Costs, Court of Common Pleas of Northhampton County, Penn-

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[1]Counsel for Petitioners first learned that the funds had been withdrawn upon receipt of the Brief in Opposition filed in this case.

sylvania Case No. 1982-C-2846 (filed March 29, 1989). Said Petition appears in its entirety in Appendix D.

Because Respondent is clearly seeking additional attorney's fees and costs under the challenged statute, Respondent's assertion that the judgment has been "paid" is a material misrepresentation of the record in this case.

This Court has held that that payment of an entire judgment does not render an appeal moot. *See, Bank of Merin* v. *England* 385 U.S. 99 (1966). This Court has also held that partial payment of a judgment does not render an appeal moot. *See, U.S.* v. *Houghan* 364 U.S. 310 (1960). In this case, there has been neither an appropriate partial payment nor full payment in satisfaction of the judgment. Consequently, there is an active case-in-controversy to be decided.

Respectfully submitted,

*Paul L. O'Brien
Arthur D. McKey
Hanson, O'Brien, Birney & Butler
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 298-6161

Thomas P. Stitt, Sr.
April L. Cordts
Stitt & Cordts
Meridian Bank Building
Suite 408
Easton, Pennsylvania 18044
(215) 253-9111

Attorneys for Petitioner

*Counsel of Record

APPENDIX A

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION

EASTON PUBLISHING COMPANY SHAREHOLDERS, AGREEMENT OF TRUST DATED OCTOBER 1, 1984 ACCOUNT OF HENRIETTA MCPHERSON AND BURLEIGH ARNOLD, SURVIVING TRUSTEES	No. 1987-885

ORDER

AND NOW, this 10th day of February, 1988, on the basis of and pursuant to the terms and conditions of the Stipulation of the Parties which is attached to this Order, it is hereby ordered that the Easton Publishing Company Liquidating Trust under Agreement, dated October 1, 1984, be terminated effective January 31, 1988, that all of the objectives to the First and Partial Account of the Trustees be and are hereby dismissed, that all remaining liabilities, obligations and expenses of Easton Publishing and its subsidiaries and the said Trust be paid and discharged, that a Final Accounting be filed by the Trustees as soon as practicable but in no event later than February 29, 1988, and that the remaining assets of the Trust be distributed to the beneficiaries of the Trust according to their interest therein. Except as to certain amounts to be retained in escrow and disbursed by the law firm of Stitt and Cordts as set forth in Paragraphs six and seven of the within Stipulation.

I, Anna D. Eckert Register of Wills/Clerk of the Orphan's Court of the Court of Common Pleas of Northampton County do hereby certify this to be a true and correct copy of record filed in this office.

Register of Wills/Clerk of the Orphan's Court

APPENDIX B

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION — LAW

ALFRED R. BOETTGER, *Plaintiff* vs THOM LOVERRO and EASTON PUBLISHING COMPANY, *Defendants*	No. 1982-C-2846

AFFIDAVIT

STATE OF PENNSYLVANIA }
COUNTY OF NORTHAMPTON } SS

RONALD W. SHIPMAN, ESQUIRE, being duly sworn according to law, does depose and state the following:

1. In the above-captioned matter, I acted as trial counsel for the defendants.

2. Subsequent to a Jury verdict in favor of the plaintiff in the sum of $17,000.00, the defendant, Easton Publishing Company, sold its assets and in order to permit the sale of assets to be completed, notwithstanding the unpaid judgment, the defendant, Easton Publishing Company, deposited, on January 26, 1984, the amount of the judgment in a joint account in my name along with the name of E. Jerome Brose, Esquire, trial counsel for the plaintiff.

3. The account created was Money Market Account No. 89-717-5 at the Lafayette Trust Bank in the name of "Ronald W. Shipman, Esquire and E. Jerome Brose, Esquire,

as Escrow Agents for Easton Publishing Company, its successors and assigns, and Alfred R. Boettger".

4. From the time of the creation of the account I believed that the account was under the joint control of Mr. Brose and myself.

5. On April 3, 1989, there was served upon me Interrogatories in Attachment, copy of which Interrogatories is attached hereto, made a part hereof and marked Exhibit "A".

6. At the time of the service of the Interrogatories upon me, I received a letter from Mr. Brose dated April 3, 1989, a copy of which letter is attached hereto, made a part hereof and marked Exhibit "B".

7. At the time of the receipt of the Interrogatories and the letter from Mr. Brose, I received a copy of the Answer proposed by Mr. Brose, copy of which Answer to Interrogatories is attached hereto, made a part hereof and marked Exhibit "C".

8. Thereafter, on April 21, 1989, within twenty (20) days of the date of the service of the Interrogatories upon me, I filed an Answer to the Interrogatories, a copy of which Answer is attached hereto, made a part hereof and marked Exhibit "D".

9. As stated in the Answer to Interrogatories, as of April 21, 1989, I believed the Money Market Account No. 89-717-5 to be in existence and to continue under my control jointly with Mr. Brose. (See Answer to Interrogatories — No. 2 — Exhibit "D").

10. On September 19, 1989, I received a telephone message from Ruth McGovern, employee of the law firm of Stitt and Cordts, who informed my secretary that the aforementioned money market account had been closed on April 14, 1989, at a time when there was on deposit in said account the amount of $25,742.38.

11. Upon receiving the information from Mrs. McGovern, I communicated with the Bookkeeping Department of the Lafayette Trust Bank and secured from that Department, copies of the following:

a) A withdrawal slip marked "General Debit document" dated April 14, 1989, bearing a signature which I believe to be that of E. Jerome Brose and withdrawing from the aforementioned Money Market Account the sum of $25,742.38, a copy of which General Debit document is attached hereto, made a part hereof and marked Exhibit "E".

b) A copy of the signature card showing both signatures and which card is stamped "Account Closed as of April 14, 1989", copy of which is attached hereto, made a part hereof and marked Exhibit "F".

c) Copy of the Treasurer's Checks on the Lafayette Trust Bank, all of which were dated April 13, 1989, numbered as set forth below with the respective amounts and payees, with endorsement information, following:

No. 021152 payable to Alfred R. Boettger for $3,301.00, endorsed "Alfred R. Boettger" "For Deposit Only — Sounds, Inc."

No. 021153 payable to Poswistilo, Elliott & Elliott for $12,371.38, endorsed "Credited to the Account of the Within Named Payee, Meridian Bank, Reading, Pennsylvania"

No. 021154 payable to Alfred R. Boettger for $270.00, endorsed "Alfred R. Boettger — Pay to the order of E. Jerome Brose — Pay to the order of Jack Bradt for County Executive — E. Jerome Brose — Jack Bradt for County Exec."

d) Lafayette Trust Bank informed me that the balance of the Money Market Account was paid in cash of $9,800.00.

Copies of the aforementioned checks are attached hereto, made a part hereof and marked Exhibit "G".

12. After being informed by Mrs. McGovern that the account was closed and confirming the closing of the account and securing a copy of the aforementioned documents, I telephoned Mr. Brose who informed me that he had closed the account and that he had been able to close the account on his signature alone without my signature. During that conversation, I informed Mr. Brose that until that day, I believed the account was under joint control and was being maintained.

13. Until September 19, 1989, I believed that this Money Market Account was in existence, was earning interest and was under my control jointly with Mr. Brose. I never consented to the closing of the aforementioned account and the distribution of the money as indicated.

/s/
Ronald W. Shipman, Esquire

Sworn to and subscribed before me)
this 29th day of September, 1989)

/s/
Notary Public

APPENDIX C

September 29, 1989

E. Jerome Brose, Esquire
1101 Building
Easton, PA 18042

RE: Boettger — Easton Publishing Company

Dear Mr. Brose:

We have recently become aware that you have withdrawn the money from the escrow account held for the benefit of Boettger and Easton Publishing Company at Lafayette Trust Bank. This account was set up under the understanding that it would not be distributed absent the consent of both escrow agents and only in the event of a final determination of the litigation. On behalf of the Shareholders of the Liquidating Trust formed for the benefit of Easton Publishing Company we hereby make demand that you immediately replace the removed funds.

Very truly yours,

/s/
April L. Cordts

APPENDIX D

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION — LAW

ALFRED R. BOETTGER, *Petitioner,* vs. THOM LOVERRO and EASTON PUBLISHING COMPANY, *Respondent.*	No. 1982-C-2846 [Filed March 29, 1989]

PETITION FOR AWARD OF REASONABLE ATTORNEYS' FEES AND OTHER LITIGATION COSTS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Poswistilo, Elliott & Elliott brings this petition for attorneys' fees and other litigation costs pursuant to the Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. § 5725(a) and avers the following facts in support thereof.

1. This action seeking damages for violation of the Wiretapping and Electronics Surveillance Control Act ("the Act") was tried before a jury and the Honorable Michael V. Franciosa on September 27, 28 and 29, 1983.

2. The jury verdict was for the plaintiff in the amount of $18,409.43, representing $1,000 in actual damages and attorneys fees of $17,409.43.

3. The attorneys' fees recovered in trial represented attorneys' charges incurred prior to trial as well as during the three-day trial itself.

4. Following the verdict, extensive proceedings took place including disposition of defendant's motions for judgment n.o.v. and new trial, entry of judgment on the verdict, appeal of said judgment to the Superior Court, reversal of said judgment by the Superior Court, obtaining allowance of appeal to the Supreme Court and, ultimately, reversal by the Supreme Court of the Superior Court's action and reinstatement of the jury verdict.

5. The Act provides recovery to the plaintiff here of "a reasonable attorneys' fee and other litigation costs reasonably incurred".

6. Attorney's fees for the pretrial work and the trial itself have been recovered via the verdict; however, the post-trial proceedings and certain litigation costs reasonably incurred in the trial were not before the jury and were not contemplated in its verdict.

7. Petitioner sets forth below the uncompensated work and expenses for which claim is made so that the court will have a basis for making an appropriate award.

Judgment N.O.V. and New Trial

For all services in connection with defendant's motion for judgment n.o.v. and new trial, including:

	Hours	
	T.R.E.	E.J.B.
Review of motions		.5
Review of defendant's brief	1.5	1.0
Research cases cited by defendant in order to distinguish or confront	13.0	4.5
Research cases to be cited by plaintiff, Shephardize; memorandum	8.0	1.0
Draft plaintiff's brief, review and redraft	12.5	2.0
Oral argument court en banc, preparation and delivery		2.5
Review of March 6, 1984 opinion	.5	.5
	35.5	12.0

T.R.E. 35.5 hours × $ 75.00 = $2,662.50
E.J.B. 12.0 hours × $100.00 = $1,200.00
$3,862.00

Superior Court

	Hours	
	T.R.E.	E.J.B.
Review reproduced record as produced by defendant	3.5	
Review defendant's brief and cases	6.5	2.5
Research and memorandum	4.5	.5
Draft and redraft of appellee's brief	37.0	4.5
Attend filing and service thereof	2.0	
Preparation and delivery of oral argument, Philadelphia	1.5	8.0
	55.0	15.5

T.R.E. 55.0 hours × $ 90.00 = $4,950.00
E.J.B. 15.5 hours × $125.00 = $1,937.50
$6,887.50

Supreme Court

	Hours		
	T.R.E.	C.W.E.	E.J.B.
Review of Superior Court panel opinion	3.0		2.0
Drafting and redrafting petition for allowance of appeal	1.0		6.5
Filing and service thereof	1.5		
Receipt and review of allowance of certiorari			.5
Preparation of reproduced record for Supreme Court; delivery, service	5.5	2.9	
Review of Superior Court brief to determine need to revise	2.5		.5
WESTLAW search		.3	
Draft and redraft Supreme Court brief	16.0		3.0
Preparation and delivery of oral argument in Philadelphia 11/10/87	2.0		12.5
Review of Supreme Court Opinion of March 8, 1989			1.0
	31.5	3.2	27.0

T.R.E. 34.5 hours × $100.00 = $3,150.00
C.W.E. 3.2 hours × $100.00 = $ 320.00
E.J.B. 12.0 hours × $125.00 = $3,375.00
$6,845.00

Proceedings to Recover Fees

	Hours	
	T.R.E.	E.J.B.
Research recoverability of fees where provision is statutory; study of cases	2.0	
Preparation of petition for fees and expenses	3.5	
Estimated for preparation and attendance at hearing if petition controverted	10.0	
Estimated for briefing and arguing if petition controverted	15.0	

Expenses Reasonably Incurred in Litigation

Expert witness expense of Gus Milides, Esq. who testified in trial on value of attorneys' services	$1,500.00
Travel, parking and meal, Philadelphia,	
for Superior Court argument	36.75
for Supreme Court argument	40.50
	$1,577.25

Recap

Time Incurred	$17,594.50
Estimated Additional Expense If Petition Controverted	$ 2,500.00
Expenses	$ 1,577.25

Wherefore, petitioner prays a rule be issued upon defendant to show cause why $17,574.50 in attorneys' fees and $1,577.25 in reasonable litigation expenses should not be awarded to petitioner if the rule is not controverted or, if controverted, why the additional expense of $2,500 should not be allowed.

POSWISTILO, ELLIOTT & ELLIOTT

By: /s/
Thomas R. Elliott, Jr.
Attorney I.D. No. 29071

ATTORNEY FOR PETITIONER
1101 Building
Easton, PA 18042

Supreme Court U.S.
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No. 89-265

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EASTON PUBLISHING COMPANY,

Petitioner,

v.

ALFRED R. BOETTGER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF *AMICI CURIAE* OF *THE PHILADELPHIA INQUIRER*, *PHILADELPHIA DAILY NEWS*, *PITTSBURGH POST-GAZETTE*, *THE PITTSBURGH PRESS*, AND PENNSYLVANIA FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

Samuel E. Klein*
Katherine Hatton
Laura E. Little
KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street, Suite 2400
Philadelphia, Pennsylvania 19107
(215) 238-1700
Counsel for Amici Curiae

*Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 1617 J.F.K. BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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No. 89-265

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BRIEF *AMICI CURIAE* OF *THE PHILADELPHIA INQUIRER*, *PHILADELPHIA DAILY NEWS*, *PITTSBURGH POST-GAZETTE*, *THE PITTSBURGH PRESS*, AND PENNSYLVANIA FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of five *amici curiae*, representing a cross-section of the news media in Pennsylvania. The amici are *The Philadelphia Inquirer*, the *Philadelphia Daily*

News, Pittsburgh Post-Gazette, The Pittsburgh Press, and the Pennsylvania First Amendment Coalition.*

These *amici* have a profound interest in this litigation because they or their members publish or broadcast daily news stories that reflect information from open court records. The Pennsylvania Supreme Court's decision below imposes civil liability for accurately reporting information derived from open judicial records, despite the special First Amendment protection this Court has repeatedly accorded such news reports. The decision below thus poses a grave threat to the *amici,* exposing them to liability in violation of this Court's precedents and thereby discouraging them from delivering to the public constitutionally protected news stories. For these reasons, the *amici* fully support petitioner Easton Publishing Company's request that this Court correct the Pennsylvania Supreme Court's far-reaching infringement of First Amendment protections.

The Philadelphia Inquirer and the *Philadelphia Daily News* are newspapers of general circulation, published in Philadelphia, Pennsylvania, by Philadelphia Newspapers, Inc., a subsidiary of Knight-Ridder, Inc. The *Pittsburgh Post-Gazette* is a newspaper published in Pittsburgh, Pennsylvania, by PG Publishing Co. Another Pittsburgh newspaper, *The Pittsburgh Press,* is published by the Pittsburgh Press Company. The final *amicus,* Pennsylvania First Amendment Coalition, is a nonprofit corporation organized under the laws of Pennsylvania to preserve, protect, and defend First Amendment rights. The Coalition consists of approximately 60 newspapers published in Pennsylvania, numerous Pennsylvania radio and television stations, and several media-related organizations.

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*Written consent to the filing of this brief, signed by all parties, has been filed with the Clerk of the Court pursuant to this Court's Rule 36.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS.

This Court has repeatedly emphasized the "special protected nature of accurate reports of judicial proceedings" and records. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). *See Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 310-311 (1977); *Nebraska Press Association v. Stuart,* 427 U.S. 539, 568 (1976). *See also The Florida Star v. B.J.F.,* 57 U.S.L.W. 4816, 4818 (U.S. June 21, 1989); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 840 (1978). In fact, the Court has unequivocally held that "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Cox*, 420 U.S., at 496. Wholly ignoring this mandate, the Pennsylvania Supreme Court's decision below imposes liability on a newspaper for accurately reporting the contents of a transcript appearing in a court file open to the public.

In its decision below, the Pennsylvania Supreme Court developed an unprecedented "intent of the official" standard for assessing whether the media may be held liable for publishing information appearing in public court records. *See* Appendix B to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, at 10b. Under this novel standard, the media are protected from liability only where information published is "of a type legally and publicly obtainable either from official court records *intentionally* placed in the public domain, or from information readily obtainable through attendance in open court." *Id.* (emphasis in original). Petitioner here, the court determined, was properly held liable for publishing quotes from the transcript found in an open court file because the transcript "was neither readily obtainable in open court nor *intentionally* placed in records accessible to the general public." *Id.* (emphasis in original).

Under the decision below, the media's liability for publishing information obtained from public court records depends solely on a factor beyond its control: the intent of the government official who placed the information in the records. Where, as here, the official unintentionally placed the information in the public domain, any member of the press publishing the information must answer to individuals aggrieved by the official's mistake. Whether acting with or without fault, the press thus becomes the indemnitor of government misconduct. Such a result is directly at odds with this Court's precedents, under which the actual intent of an official who included information in public records is irrelevant. *See Florida Star*, 57 U.S.L.W., at 4819-4820 (even where government's release of information to the press was inadvertent, it is anomalous to sanction entities other than the government representatives who were the source of the release); *Cox*, 420 U.S., at 495 ("[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served"). *See also Smith v. Daily Mail Publishing Co.*, 422 U.S. 97, 103 (1979).

II. THE PENNSYLVANIA SUPREME COURT'S DECISION WILL HAVE FAR-REACHING, ADVERSE CONSEQUENCES.

By imposing strict liability for accurate reports of official court records, the Pennsylvania Supreme Court has transformed an area of news reporting formerly subject to constitutional privilege into a minefield of risks for the press. Indeed, the decision below contains nothing confining its scope to matters relating to wiretapping and surveillance.

Like the laws of other states, Pennsylvania's statutes are permeated with provisions that may give rise to civil or criminal liability for disclosure of confidential information.* Under the

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**See, e.g.*, 18 Pa. Cons. Stat. Ann. §9121(b)(2) (limiting circumstances under which an individual's criminal history may be disseminated to the public); 42 Pa. Cons. Stat. Ann. §4549(b) (providing that certain persons revealing information about grand jury proceedings shall be in contempt of

decision below, members of the press may be held liable for the actions of public officials who violate these provisions by placing protected material in public court records.

Reporters can no longer rely on the "special protected nature" of court records. *Cox*, 420 U.S., at 492. Instead, a reporter wishing to convey newsworthy information contained in open court records is now burdened with a complex series of inquiries: (i) determining whether the information could be subject to a confidentiality law; (ii) identifying the public official who placed the information in the records; and (iii) ascertaining the intent of the official in placing the information there. If the reporter concludes that the official acted improperly, or at least inadvertently, then the decision below requires the reporter to engage in self-censorship, despite the availability of the information to any citizen who asks to inspect the court records. This Court's intervention is needed to reverse such a far-reaching encroachment on the media's ability to report news to the public.

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court); 42 Pa. Cons. Stat. Ann. §5988 (providing penalties for disclosure of the name of child victims of sexual or physical abuse); 62 Pa. Stat. Ann. §404(a) (limiting information that may be disclosed concerning recipients of public assistance and limiting manner in which disclosed information may be used); 72 Pa. Cons. Stat. Ann. §7274 (providing penalties for "divulging" certain tax information gathered by the department of revenue).

CONCLUSION

The *amici* respectfully urge the Court to grant Easton Publishing Company's Petition for a Writ of Certiorari and to set the matter for oral argument. In the alternative, the *amici* support Easton Publishing Company's request for the Court to grant the Petition and to summarily reverse the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

Samuel E. Klein*
Katherine Hatton
Laura E. Little
KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street, Suite 2400
Philadelphia, Pennsylvania 19107
(215) 238-1700

Counsel for Amici Curiae

* Counsel of Record

APPENDIX

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

18 Pa. Cons. Stat. Ann. §9121(b)(2):

> (b) Dissemination to noncriminal justice agencies and individuals. — Criminal history record information shall be disseminated by a State or local police department to any individual or noncriminal justice agency only upon request:
>
> * * * *
>
> (2) Before a State or local police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests, indictments or other information relating to the initiation of criminal proceedings where:
>
> (i) three years have elapsed from the date of arrest;
> (ii) no conviction has occurred; and
> (iii) no proceedings are pending seeking a conviction.

42 Pa. Cons. Stat. Ann. §4549(b):

(b) Disclosure of proceedings by participants other than witnesses. — Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Commonwealth for use in the performance of their duties. The attorneys for the Commonwealth may with the approval of the supervising judge disclose matters occurring before the investigating grand jury including transcripts of testimony to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to secrecy and shall be in contempt of court if they reveal any information which they are sworn to keep secret.

42 Pa. Cons. Stat. Ann. §5988:

(a) Release of name prohibited. — In a prosecution involving a child victim of sexual or physical abuse, unless the court otherwise orders, the name of the child victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the child victim will not be open to public inspection.

(b) Penalty. — Any person who violates this section commits a misdemeanor of the third degree.

62 Pa. Stat. Ann. §404(a):

(a) The department shall have the power to make and enforce regulations:

(1) To protect the names of applicants for and recipients of public assistance from improper publication, and to restrict the use of information furnished to other agencies or persons to purposes connected with the administration of public assistance. Upon request by any adult resident of the

Commonwealth, the department may furnish the address and amount of assistance with respect to persons about whom inquiry is made; but, information so obtained shall not be used for commercial or political purposes; and, no information shall be furnished regarding any person's application for, or receipt of, medical assistance.

(2) To protect the rights and interests of persons about whom personal or confidential information is in its possession.

72 Pa. Cons. Stat. Ann. §7274:

Any information gained by the department as a result of any return, examination, investigation, hearing or verification, required or authorized by this article, shall be confidential, except for official purposes and except in accordance with proper judicial order or as otherwise provided by law, and any person unlawfully divulging such information shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not in excess of one thousand dollars ($1000) and costs of prosecution, or to undergo imprisonment for not more than one year, or both.

No. 89-265

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OCTOBER TERM, 1989

EASTON PUBLISHING COMPANY,

Petitioner,

v.

ALFRED R. BOETTGER,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Pennsylvania

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AMERICAN SOCIETY OF NEWSPAPER EDITORS A.H. BELO CORPORATION CBS INC. CHRONICLE PUBLISHING COMPANY COOKE MEDIA GROUP, INC. THE COPLEY PRESS, INC. DONREY, INC. DOW JONES & COMPANY, INC. NATIONAL ASSOCIATION OF BROADCASTERS NATIONAL BROADCASTING COMPANY, INC. NEW YORK TIMES COMPANY RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS SEATTLE TIMES COMPANY SOCIETY FOR PROFESSIONAL JOURNALISTS TIMES MIRROR COMPANY AND WASHINGTON POST COMPANY IN SUPPORT OF PETITIONER

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*ALICE NEFF LUCAN
RICHARD P. HOLME
DAVIS, GRAHAM & STUBBS
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 822-8660

*Counsel of Record

Attorneys for Amici

[Additional Counsel Listed Inside Cover, Front and Back]

OF COUNSEL

SANDRA BARON
Managing General Attorney
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10112
(212) 664-3305

CLAUDIA JAMES
Director/Legal and
Government Affairs and
Associate General Counsel
American Newspaper Publishers
Association Foundation
11600 Sunrise Valley Drive
Reston, Virginia 22071
(703) 648-1000

STEVEN BOOKSHESTER
Associate General Counsel and
First Amendment Attorney
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

BOISFEUILLET JONES, JR.
Vice President and Counsel
The Washington Post Company
1150 15th Street, N.W.
Washington, D.C. 20071
(202) 334-7141

P. CAMERON DEVORE
DAVIS, WRIGHT & JONES
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150
Attorney for
The Seattle Times Company

JANE E. KIRTLEY
Executive Director
Reporters' Committee for Freedom
of the Press
1735 Eye Street, N.W.
Suite 504
Washington, D.C. 20006
(202) 466-6312

HAROLD W. FUSON, JR.
JUDITH L. FANSHAW
The Copley Press, Inc.
7776 Ivanhoe Avenue
La Jolla, CA 92037
(619) 454-0411

MICHAEL J. MCCARTHY
Senior Vice President and
General Counsel
A.H. Belo Corporation
400 South Record Street
Dallas, Texas 75202
(214) 977-8730

DOUGLAS P. JACOBS
JOHN W. ZUCKER
CBS Inc.
51 West 52nd Street
New York, NY 10019
(212) 975-3573

WILLIAM A. NIESE
Vice President and General Counsel
Los Angeles Times
Times Mirror Square
Los Angeles, CA 90053
(213) 237-4303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-265

EASTON PUBLISHING COMPANY,

Petitioner,

v.

ALFRED R. BOETTGER,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Pennsylvania

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BRIEF AMICI CURIAE OF
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
AMERICAN SOCIETY OF NEWSPAPER EDITORS
A.H. BELO CORPORATION
CBS INC.
CHRONICLE PUBLISHING COMPANY
COOKE MEDIA GROUP, INC.
THE COPLEY PRESS, INC.
DONREY, INC.
DOW JONES & COMPANY, INC.
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL BROADCASTING COMPANY, INC.
NEW YORK TIMES COMPANY
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS
SEATTLE TIMES COMPANY
SOCIETY FOR PROFESSIONAL JOURNALISTS
TIMES MIRROR COMPANY
AND WASHINGTON POST COMPANY
IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The American Newspaper Publishers Association, American Society of Newspaper Editors, A.H. Belo Corporation, CBS Inc., Chronicle Publishing Company, Cooke Media Group, Inc., The Copley Press Inc., Donrey, Inc., Dow Jones & Company, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., New York Times Company, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Seattle Times Company, Society for Professional Journalists, Times Mirror Company, and Washington Post Company submit this brief *amici curiae* in support of petitioner Easton Publishing Company. All parties to this suit have given *amici* written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and "the best means to that end is to open the channels of communication, rather than to close them. . . ." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). "The freedom of the press to publish that information [that appears in public records] appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("*Cox Broadcasting*").

All *amici* or their constituent members abide by the foregoing principles and routinely report on the activities of government in their local areas, and many of them cover governmental activities in other states. Many distribute their newspapers or broadcast their news coverage into other states. A detailed description of each organization appears in Appendix A.

Amici often obtain governmental and judicial documents which contain information about events of public importance. All *amici*, and their readers, viewers and listeners, have an interest in being able to disseminate, receive and use that governmental and judicial information without being exposed to liability for doing so.

The Pennsylvania wiretapping statute at issue in this case and the interpretation given it by the Pennsylvania Supreme Court penalize the publication of truthful information relating to alleged criminal conduct, lawfully obtained from open court records. The decision below imposes upon the media the intolerable burden of ascertaining before publication that any document found in a public file was lawfully or intentionally placed therein by authorized government personnel. This, and other pragmatic problems created by the ruling below impel *amici* to urge this Court to grant petitioner's Petition for Writ of Certiorari and to reverse summarily the Pennsylvania Supreme Court's decision.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amici adopt the questions presented, constitutional provisions involved and statement of the case, all as

set forth in the petitioner's Petition for Writ of Certiorari.

ARGUMENT

FLORIDA STAR MANDATES SUMMARY REVERSAL

In *Florida Star v. B.J.F.*, ___ U.S. ___ ,109 S. Ct. 2603 (1989) ("*Florida Star*"), this Court held: "Where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order. . . " *Id.*, 109 S. Ct. at 2613. The Pennsylvania Supreme Court's decision in *Boettger v. Loverro*, 555 A.2d 1234 (Pa. 1989), directly contradicts *Florida Star* and should summarily be reversed. *See Oklahoma Publ. Co. v. District Court of Oklahoma*, 430 U.S. 308 (1977) ("*Oklahoma Publ. Co.*") (summary reversal invoked in similar First Amendment context).

The Pennsylvania Supreme Court's decision in *Boettger v. Loverro*, *supra*, if allowed to stand, would put every newsroom in jeopardy of a lawsuit each time its reporters report on the contents of open government files. No news story based on government records could be published safely until state and federal statutes, regulations and case law had been searched for any provision which might render that information confidential. Then, if potentially confidential information were thereby identified, it would have to be determined whether the document was filed intentionally. Otherwise, the news organization would risk liability and indeterminate damages for the publication of confidential information that a government employee had inadvertently placed in the file against the law.

Florida Star held that the newspaper could not be liable for civil penalties under a state criminal statute for the publication of a rape victim's name that was inadvertently disclosed in a police press release. In doing so it relied on the formula articulated in *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97, 103 (1979), which had synthesized "the prior cases involving attempts to punish truthful information." *Florida Star*, *supra*, 109 S. Ct. at 2609. *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Publ. Co., supra; Cox Broadcasting, supra.* *Florida Star* emphasized three factors, "in addition to, of course, the overarching 'public interest served by the Constitution in the dissemination of truth.'" *Id.*, 109 S. Ct. at 2609 (citations omitted). These factors were (1) whether the information was lawfully acquired, (2) whether punishment of the press would advance a state interest of the highest order, and (3) whether "timidity and self-censorship" might result from such punishment. *Id.*, 109 S. Ct. at 2609-10.

A. THE PUBLISHED MATERIAL WAS OBTAINED LEGALLY.

As to the first factor, there is no question that the reporter obtained the information legally. The wiretap transcript was contained, unsealed, in a court file, and given to petitioner's reporter by a clerk in the court clerk's office.

B. THE SANCTIONS DO NOT ADVANCE A STATE INTEREST OF THE HIGHEST ORDER.

The second factor, the failure to advance state interest of the highest order, is also met here. In *Florida Star*, in spite of great sensitivity to the plight of innocent rape victims, the concern was not enough

to become a state interest of the highest order. It cannot follow that protecting wiretapped conversations revealing criminal gambling activity from publication is an interest of the highest order.[1] The privacy concerns for those accused of crimes must be considerably less than the privacy concerns for rape victims. *Id.*, 109 S. Ct. at 2615 (White, J. dissenting). Indeed, as noted in the RESTATEMENT (SECOND) OF TORTS, "those who commit crime or are accused of it" are,

> persons of public interest, concerning whom the public is entitled to be informed. . . . As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, *and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.*

Id., § 652, comment f, at 389 (1981) (emphasis added).

Punishing the media is not a measure narrowly tailored to advance whatever state interest there may be in protecting against disclosure of inadvertently released wiretaps. First, the punishment is directed to the wrong party. Second, the Pennsylvania statute already has just and adequate remedies in its other provisions.

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[1] The *Easton Express* story (see Appendix B), although not even discussed in the lower court opinions, is an accurate and straightforward account of Alfred Boettger's conversations regarding gambling on college football games. *Cf., Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967).

Florida Star notes:

> Where as here the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting, Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a reasonably tailored means of safeguarding anonymity.

Id., 109 S. Ct. at 2611. If there is to be any remedy for the government's error in placing the transcript in the open file, "hopes for restitution" must come from the government's own willingness to compensate victims for their loss of privacy. *Id.*, 109 S. Ct. at 2611-12. It is indeed, "highly anomalous to sanction persons other than the source of the [confidential] release." *Id.*, 109 S. Ct. at 2610

It is also true that the Pennsylvania law takes the appropriate and *constitutional* steps to accomplish its purpose. The Pennsylvania statute, 18 PA. CONS. STAT. ANN., § 5701, *et seq.*, (Purdon 1959 and Supp. 1989), contains a number of safeguards to prevent disclosure of wiretapped conversations and provides remedies in the event the wiretap transcript is disclosed. It provides for criminal actions against state employees (*id.* at § 5718) and waives sovereign immunity so that civil damage suits can be brought against state officials. *Id.* at § 5725(c). Though the record in this case is silent as to whether any of these other remedies were used, their availability suggests that more attention can be paid to the handling of this material by state employees and several other "less drastic" measures can be used short of penal-

izing the innocent newsgatherer. Indeed, "where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star*, 109 S. Ct. at 2609.

C. THE RULE CITED BY THE COURT BELOW WOULD CREATE INTOLERABLE DIFFICULTIES FOR NEWSGATHERERS.

The final factor expressed by *Florida Star* is the "timidity and self-censorship that may result from allowing the media to be punished for publishing truthful information." *Id.*, 109 S. Ct. at 2610. The Pennsylvania Supreme Court's decision, if allowed to stand, would have a profoundly adverse impact on newsgathering in every state, because it would allow strict liability to produce penalties for the innocent publication of accurate and lawfully obtained information.

Since the Pennsylvania Supreme Court did not have the guidance of *Florida Star*, it could not know that its effort to distinguish its statute from this Court's prior cases would be directly contrary to *Florida Star*. The Pennsylvania court attempted to distinguish several of the prior cases of this Court (*Cox Broadcasting*, *Smith*, and *Oklahoma Publ. Co.*, *supra*), on the grounds that those cases involved documents "intentionally" placed in the public record rather than "inadvertently" placed in the record as here. In the first place, *Florida Star* held that liability could not be imposed on publication of information inadvertently released by the government. However, even prior to *Florida Star*, the emphasis on the distinction between inadvertent and intentional disclosure was without

merit. *Boettger v. Loverro, supra*, 555 A.2d at 1239. The rationale of *Cox Broadcasting* makes irrelevant any distinction between inadvertent or intentional placement of records in the file:

> [T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection. . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. . . . If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.

Cox Broadcasting, supra, 420 U.S. at 494-495. This is a policy which does not permit second-guessing or "qualified" openness. A public file is a public file and it is the State's, not the media's, responsibility to maintain the file properly.

In the second place, it is not feasible to require newsgatherers to ascertain that any and all records were "intentionally," not "inadvertently", placed in a public file. This would also necessarily require learning *who* placed the documents in the file and whether that person was authorized to do so.

Furthermore, the Pennsylvania rule ignores two concepts inherent to the American newsgathering process. Reporters properly start from a deeply-ingrained concept that there is a privilege to make fair

and accurate reports of governmental and judicial proceedings. *See*, LIBEL DEFENSE RESOURCE CENTER 50-State Survey, Row XII, 930-33, 954-56 (Kaufman ed. 1988). Indeed, this privilege is recognized in Pennsylvania. *See, e.g., Kernick v. Dardanell Press*, 428 Pa. 288, 236 A.2d 191 (1967). Reporters are also familiar with a common law cause of action in most states for invasion of privacy, which includes as one of its principal tenets, an exception for news stories that are of public interest and concern. RESTATEMENT (SECOND) OF TORTS, § 652D comment d, page 388 (1981). The Pennsylvania court never considered either tenet but created a rule that would add an impenetrable thicket of applicable individual state statutes and case law, with potential liability for publication of matters "inadvertently" included in those government files.

Even trying to ascertain what might be deemed confidential, as would be required by the Pennsylvania rule, would be baffling. In the State of Florida alone, for example, there are more than *300* such statutes. See FLORIDA BAR, FLORIDA PRESS ASS'N, FLORIDA ASS'N OF BROADCASTERS, "REPORTER'S HANDBOOK" (rev. ed. Feb. 1, 1988). The *amici* are unaware of any other compendium of laws conveniently setting out *confidential* records in the states in which they operate.

But for many of the news organizations in this country, a search of one state's laws would be insufficient. Pennsylvania, for example, shares borders with six states. Media located in those states and elsewhere, including national and regional organizations, often send reporters into the state to cover news stories. These organizations would have to be

familiar with Pennsylvania law as well as those of every other state in which they gather the information they broadcast or distribute.

Under these circumstances, it is virtually impossible for newsgatherers to know or even to guess what information in public government documents might be deemed "private" by a particular state legislature. The disparate treatment given only one type of record, state personnel records, illustrates this fact. For example, under Pennsylvania's Right to Know Act, 65 PA. CONS. STAT. ANN., § 66.1(2), (Purdon 1959 and Supp. 1989), records that would "operate to the prejudice or impairment of a person's reputation or personal security" are closed. However, the law does not protect "personal privacy." *Kanzelmeyer v. Eger*, 16 Pa. Commw. 495, 329 A.2d 307 (1974).

In Ohio, personnel records are not exempted from disclosure, 1 OHIO REV. CODE ANN., § 149.43(a), *et seq.*, (Page 1984 and Supp. 1988), and case law permits disclosure of personnel records. *See, e.g., State v. Bundy*, 20 Ohio St. 3d 51, 485 N.E.2d 1039 (1985). However, if the document is not required to be kept by law and is not necessary to the execution of the public official's duties and responsibilities, then disclosure is not authorized. *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 481 N.E.2d 632, 634 (1985). If that document contained information that was "personal" under the Personal Information Systems Law (13 OHIO REV. CODE ANN., § 1347.01(e)), sanctions may follow harmful disclosure, § 1347.10(A), *et seq.* (effective 1-23-81).

In West Virginia, W. VA. CODE, § 29-6-16 (1986 and Supp. 1989), the law requires that records of the State Personnel Department shall be open to public

inspection, except for information that is "confidential for reasons of public policy." *Id.* The West Virginia Freedom of Information Act (W. VA. CODE, § 29B-1-1, *et seq.* (1986 and Supp. 1989)), exempts from disclosure records "of a personal nature", if disclosure would create "an unreasonable invasion of privacy, *unless* the public interest by clear and convincing evidence requires disclosure in the particular instance." *Id.* at § 298-1-4(2) (emphasis added). *See also Hechler v. Casey*, 333 S.E.2d 799 (W. Va. 1985).

Without belaboring this example further, statutes, cases, and even Governor's Executive Orders must be reviewed in each of the other states to determine the status of the law on one narrow aspect of the disclosure of state government records. When newsgatherers are faced with the enormous variety of governmental and judicial records they do and should examine, the task of determining whether a record was lawfully included in the file would not be feasible.

In short, this Pennsylvania rule of liability for publishing materials legally obtained from public records would create not just timidity but chaos for news organizations reporting on the activities of government agencies. The burden that would be imposed by the Pennsylvania Supreme Court's decision is intolerable. When based on sources that should be the most accessible, trustworthy, and newsworthy—government records and court files—speech would be chilled to the point of being frozen solid. This should not be, and under the holding of *Florida Star*, cannot be tolerated.

CONCLUSION

Wherefore, *amici curiae* urge this Court to grant the Petition for Writ of Certiorari and to reverse

summarily the Pennsylvania Supreme Court ruling in this case.

Respectfully submitted,

*ALICE NEFF LUCAN
RICHARD P. HOLME
DAVIS, GRAHAM & STUBBS
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 822-8660

*Counsel of Record

Attorneys for Amici

APPENDIX

APPENDIX A

The American Newspapers Publishers Association ("ANPA") is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,410 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper publishing business, and has frequently presented its views to this Court as an *amicus curiae* in cases touching on those concerns.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the Untied States. The purpose of the Society includes the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

A.H. Belo Corporation owns *Dallas Morning News* and Dallas-Suburban Newspapers, Inc. It owns and operates 5 network affiliated television stations in the states of California, Oklahoma, Texas and Virginia.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national and radio networks.

The Chronicle Publishing Company publishes the *San Francisco Chronicle*, a daily newspaper distributed primarily in Northern California, with a daily circulation of in excess of 570,000. It also owns smaller newspapers in the states of Illinois, and Massachusetts. The Chronicle Publishing Company owns and operates television stations in San Francisco, California; Omaha, Nebraska; Wichita,

Kansas; and Colby, Kansas. In addition, it owns several cable television systems in California and one in New Mexico.

Cooke Media Group, Inc. owns and publishes the *Daily News*, a general circulation newspaper that is published in Los Angeles, California and distributed throughout the Southern California region.

The Copley Press, Inc. publishes five daily newspapers in California—*The San Diego Union, The Tribune, The Daily Breeze, The News-Pilot* and *The Outlook*—whose combined circulation exceeds 500,000 copies daily, as well as eight daily newspapers in Illinois, and operates a national news service.

Donrey, Inc. is a Nevada corporation which does business as Donrey Media Group, publishes 58 daily newspapers and 73 non-daily newspapers, and owns and operates one television station and 5 cable television companies in 20 states.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal, Barron's National Business and Financial Weekly*, the Dow Jones News Services and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 28 communities in 13 states, including Sharon, Stroudsburg and Sunbury, Pennsylvania.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association which serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to disseminate information freely about the activities of government and other matters of public concern.

National Broadcasting Company, Inc. ("NBC") owns and operates a national television network, and itself, and

through subsidiaries, operates television stations, all of which are engaged in gathering and disseminating news to the public.

The New York Times Company owns and publishes the New York *Times*, a daily newspaper with a national circulation of 1.1 million and over 1.6 million on Sunday. The Company also owns five TV stations, including WNEP-TV in Wilkes-Barre, Pennsylvania, 35 regional newspapers and several national magazines.

Radio-Television News Directors Association is a professional association of radio and television journalists. The Association has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information.

Seattle Times Company publishes *The Seattle Times*, the largest daily and Sunday circulation newspaper in the Pacific Northwest, and also publishes the *Walla Walla Union-Bulletin*.

The Society of Professional Journalists is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

The Times Mirror Company publishes *The Los Angeles Times*, a newspaper with a circulation of more than 1,127,000 daily and more than 1.4 million on Sunday. Times

Mirror publishes eight other newspapers, including *Newsday*, *The Baltimore Sun* and *The Evening Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies. The Company also operates book and magazine publishing firms, four television stations, and provides cable television service in states.

The Washington Post Company publishes *The Washington Post*, a daily newspaper in Washington, D.C., with a circulation of 814,000 and a Sunday circulation of 1,149,000.

APPENDIX B

EASTON EXPRESS NEWS STORY

WIRETAP REVEALS GAME BETTING BIG BUSINESS

by THOM LOVERRO
Express staff writer

EASTON—Alleged conversations among Wayne Dickinson, Alfred Boettger and James Kayal about college football games probably differ a good bit from the usual talk of weekend football between arm-chair quarterbacks.

The conversations among those three men, taped by state police via a wiretap, allegedly involved betting in the thousands of dollars, according to transcripts on file in the Northampton County Courthouse.

Boettger, of Route 611 in Forks Township, and Kayal, of the 1200 block of Ann Marie Street in Palmer Township, were arrested Dec. 12 at their homes by state police at Bethlehem and accused of accepting illegal bets on sporting events from Dickinson between April 8 and Dec. 3, 1981.

Dickinson, a Palmer Township resident, went to the state police for protection because of a gambling debt allegedly owed to Boettger and Kayal, documents at the courthouse show.

Gus Milides, Kayal's lawyer, and E. Jerome Brose, attorney for Boettger, filed a motion to suppress the wiretapped conversations, mainly on the basis that the tapes of the alleged conversations were not guarded according to state law from possible editing or altering.

However, Northampton County Judge Franklin S. VanAntwerpen denied the motion.

In the Dec. 12 raid, $32,124 was seized by police, along with three football pool tickets and sheets with numbers

on them, according to testimony by Robert Miklich, one of three troopers who set up the wiretap.

One of those conversations includes a discussion allegedly between Boettger and Dickinson on Nov. 19, 1981, about the upcoming weekend college football games and whether Dickinson could place a bet on them with his outstanding debt from previous bettings.

Excerpts from the tapes:

Boettger: "So I'm scrambling and picking up money. You know, moving around, paying, collecting, paying, collecting, all day. I was running. Tomorrow, I got to finish up because the weekend is starting again. So I got to . . . "

Dickinson: "What does it look like for this weekend?"

Boettger: "What do you mean?"

Dickinson: "Games, Anything worthwhile?"

Boettger: "I don't know. There's a lot of games, Nebraska-Oklahoma, Penn State-Notre Dame, there are a lot of big games. I don't know how it's going to go. You know, there is Mississippi State-Mississippi, all these wild (not audible) Washington State-Washington. They are all playing: USC-UCLA, that's on television."

Dickinson: "Penn State-Notre Dame is no, right?"

Boettger: "No, that is not on TV, no."

Dickinson: "Oh, isn't it?"

Boettger: "No, they are having . . . Who the hell is on early? USC-UCLA on late. What's the first game? I'm trying to think what I saw as the first game, a . . . [bleep]: wait a minute. I got a schedule here, I could probably guess at who it is. Oh, Ohio State and Michigan, ya. I read it first hand, Ohio State and Michigan on early and USC and UCLA on late."

Dickinson: "Like I said the other night, if I get two grand. $2,500, could I do something small?"

Boettger: "Small . . . small."

The conversation continued centering on whether Dickinson would be allowed to bet anymore:

Boettger: "Do you know what I mean, I can't let you bet big, not when you owe this kind of money. I mean even if you pay us off, I don't want . . . you can't bet like that again."

Dickinson: "No, I am done with this s---."

Boettger: "I don't want 300 times for nobody. I got guys that bet with me for 5 or 6 years an bet big money. I wouldn't let them go for 300 times." (*Editor's note: Times is a term used for $5 betting. If a person says he wants to bet 300 times, it would mean a $1,500 bet*).

Dickinson: "Ya."

Boettger: "The bet I would take is a dime [$1,000] and these guys got the money. The most I would take is $1,000, a thousand from any one person and I don't even want that—and these guys pay. I mean, like today, I went to see a guy today, he bets me a dime a game. He owed me $2,500. It was there, no problem."

A second conversation, this one allegedly between Kayal and Dickinson, was recorded by police on Nov. 17, 1981. The transcripts contain references to a $20,000 gambling debt owed by Dickinson in Hazleton:

Kayal: "Well, I mean, you know, but how long should I wait (not audible). OK you ran that joint up there. OK I know a guy that stuck you . . . "

Dickinson: "Yeah, for a whole bunch of money."

Kayal: "Right."

Dickinson: " . . . What you gonna do? Break their heads and go to jail? That's [not audible]. I got 18 to 20 grand laying on the streets up there and I'll never see it unless I want to get tough."

DAVID M. OLIVE
Assistant General Counsel
Donrey Media Group
920 Rogers Avenue
Fort Smith, Arkansas 72902-1359
(501) 785-7806

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660
Attorney for
Radio-Television News Directors Association

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500
Attorney for
Society of Professional Journalists

HOWARD B. SOLOWAY
DONOVAN LEISURE NEWTON IRVINE
330 South Grand Avenue
Suite 4100
Los Angeles, CA 90071
(213) 253-4000
Attorney for
Cooke Media Group, Inc.

RICHARD M. SCHMIDT, JR.
COHN & MARKS
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860
Attorney for American Society of Newspaper Editors

RICHARD J. TOFEL
Counsel
Dow Jones & Company, Inc.
200 Liberty Street
New York, NY 10281
(212) 416-2951

NEIL L. SHAPIRO
COOPER, WHITE & COOPER
101 California Street
16th Floor
San Francisco, CA 94111
(415) 433-1900
Attorney for
San Francisco Chronicle

SOLOMON B. WATSON, IV
GEORGE FREEMAN
The New York Times Company
229 West 43rd Street
New York, New York 10036
(212) 556-1234